In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY,
RESPONDENTS.

No. 71-1607

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

THE BOEING COMPANY AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Chronological List of Relevant Docket Entries

2.18.66	Charge filed
8. 9.69	Complaint and Notice of Hearing, dated
8.22.68	Union's answer to complaint, dated
10. 2.68	Hearing Opened
10. 3.68	Hearing Closed
12.30.68	Trial Examiner's Decision issued
2.27.69	Union's exceptions to Trial Examiner's Decision, dated
2.28.69	Charging Party's exceptions to the Trial Examiner's Decision, received
3. 3.69	General Counsel's exceptions to the Trial Examiner's Decision, received
8.27.70	Decision and Order issued by the National Labor Relations Board
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10.27.70	Petition for review filed by the Company
11.16.70	Board's cross application for enforcement filed
2. 3.72	Decision of the District of Columbia Court of Appeals, filed
3.14.72	Judgment entered by the District of Columbia Circuit Court of Appeals
12.18.72	Order of the Supreme Court granting certiorari, dated

[CAPTION OMITTED IN PRINTING]

TRIAL EXAMINER'S DECISION

Statement of the Case

RAMEY DONOVAN, Trial Examiner: The charge in this case was filed on February 18, 1966 by The Boeing Company, herein the Employer or Boeing. The General Counsel of the N.L.R.B., herein the General Counsel, issued a complaint under date of August 9, 1968 against Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, herein Respondent or the Union. The Complaint alleged that in the period October-December 1965, and January 1966, the Union levied fines against named employees and other employees of Boeing in the sum of $450 each for crossing the union's picket lines and working during a union strike against Boeing from September 16, 1965 to October 4, 1965. It is alleged that the above fines were unreasonable, excessive, and discriminatory. Further alleged is that, in the period aforementioned, the Union levied fines against named and other employees for the same reasons described above although these employees had resigned from the Union prior to working during the strike and prior to being fined. These fines are also alleged to be unreasonable, excessive and discriminatory. The complaint additionally alleges that in connection with all the fines in the situations hereinabove, Respondent instituted or threatened to institute legal proceedings against employees who failed or refused to pay the fines. All the aforementioned conduct is alleged to have restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and thereby constituted a violation of Section 8(b)(1)(A) of the Act.

In general terms, Respondent's answer denies the allegations of the complaint aforedescribed although admitting that Respondent "did institute legal proceedings against certain employees who failed or refused to pay fines imposed upon them."

The case was tried before Trial Examiner Ramey Donovan in New Orleans, Louisiana on October 2-3, 1968. All parties were represented by Counsel.

[2] I. Jurisdiction

Boeing is a Delaware corporation with its principal office in Seattle, Washington, and it is engaged in the manufacture of aircraft and aircraft parts at Wichita, Kansas, and at Seattle and Renton, Washington. Boeing also operates a plant at New Orleans, Louisiana known as the Michoud plant, which is the only plant directly involved in this proceeding. The Michoud plant is performing work for the National Aeronautics and Space Administration. It is estimated that in September 1965 approximately 6000 employees were employed at Michoud, of which approximately 1500-1900 employees were in the unit represented by Respondent Union.

Boeing is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

The Facts

A contract between Boeing "and The International Association of Machinists, AFL-CIO and those of its lodges now and hereafter representing employees of the Company . . ." was in effect from May 16, 1963 to September 15, 1965. Various units of production and maintenance employees were covered by the contract, such as the Seattle-Renton unit; the Atlantic Missile Test Section unit; the Wichita unit. The Seattle-Renton unit included company employees in the unit in the State of Washington and company employees in the unit "at Remote Locations identified with the Seattle-Renton Primary Location. . . ." Following a description of the Seattle-Renton unit the contract states that "Such unit is primarily identified with the Primary Location known as Seattle-Renton and with Aeronautical Industrial District Lodge No. 751 (IAM; AFL-CIO)."[1] A "Remote Location" is defined as "a company operation located in an area away from a Primary Location and designated by the Company as a Remote Location, such as Michoud

[1] Aeronautical Industrial District Lodge No. 751 will be referred to as District Lodge 751.

Plant. . . ." The signatories to the contract were the IAM and Boeing and District Lodge 751; District Lodge 70; and Banana River Lodge 2061.

Booster Lodge 405, herein Lodge 405, which embraces the unit employees at Michoud, was not in existence at the time of the execution of the above contract. At that time, Michoud was a "Remote Location" under the contract, the Primary Location being Seattle-Renton. The unit was identified with the Primary Location and with District Lodge 751, Seattle. Lodge 405 came into existence sometime later in 1963. Lodge 405 is not mentioned in any contract until the contract that was executed in October, 1965.

The contract provides that unit employees who are members of the Union or who become members are required to maintain their membership as a condition of employment. Employees hired after the effective date of the contract, who are not members of the Union, have a specified period [3] in which to give notice that they do not desire to become union members. Such notice, in writing, is to be sent to District Lodge 751 in Seattle, with a copy to the Boeing Corporate Labor Relations Office in Seattle.

Upon the expiration of the contract on September 15, 1965, the Union struck and picketed Boeing at Michoud and other locations. The strike was over economic issues between the parties. The strike ended on October 3, 1965 and a new contract was entered into.

During the strike, certain employees who were in the contract unit at Michoud crossed the picket line and worked. At one time during the period of the contract all these employees were members of the Union. Some of these employees had allegedly resigned from the Union prior to returning to work and all of these alleged resignees had taken their steps of alleged resignation prior to any action by the Union against them because of their return to work during the strike. Another group of the returners-to-work during the strike, who were union members, made no attempt to resign from the Union. The Union made no distinction between the two foregoing groups and, after the strike, it proceeded to try and to fine these employees and to institute legal action to collect unsatisfied fines. There is no evidence that before or during the strike the Union warned employees that fines or any other action would be taken against those who worked during the strike.

Article L, Article XXIV, Section 3, of the constitution of the International Association of Machinists, provides, under the caption, "Improper Conduct of a Member" that:

> The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing as hereinafter provided:
>
> * * *
>
> Refusal or failure to perform any duty or obligation imposed by this constitution; the established policies of the I.A.M.A.W.; the valid decisions and directives of any officer or officers thereof . . . .
>
> * * *
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under the constitution, without permission.
>
> * * *

Although the internal due process of the steps taken by the Union with respect to the employees aforedescribed, who had worked during the strike, is not in issue, a brief description of the various steps is appropriate. The record indicates that these steps were initiated in November 1965, or possibly the latter part of October, 1965.

[4] By mail, an employee was notified that he had been charged with violating the constitution of the Union, specifically Article XXIV, Article L, Section 3, "Accepting employment . . . in an establishment where a strike . . . exists. . . ." He was advised of the time and place of his trial before the Trial Committee and the fact that the charges would be read to him and that he could have an attorney who was "a member of the I.A.M.A.W." to defend him. The Trial, it was stated, would proceed if he did not appear.

According to Higgins, business representative of Lodge 405 during the strike and immediately thereafter, and subsequently president of Lodge 405, those employees who did not appear at their trial were fined $450; those who ap-

peared and were found guilty were fined $450;[2] those who appeared before the Trial Committee and said that they were sincerely sorry about what they did and said that they wished to be good union members, had their $450 fines reduced to 50 percent of what they earned by working during the strike.[3] By letter or otherwise, there was no notification to employees by the Union that it had reduced or would reduce the fines to 50 percent of earnings under some circumstances. Higgins states, however, that the foregoing reduction was "general conversation." This appears to be a dubious basis for a factual finding of general knowledge and at best would indicate that some employees, other than those who had actually received such reductions, may have heard of some reductions. Regarding the implementation of the reduction in those cases where it was granted, Higgins states that the Union did not know the earnings of the particular individuals and took their word as to earnings, in arriving at the 50 percent balance.[4]

Some "fleshing out" of Higgins' testimony is to be found in typical letters in the record that were sent by the Union to the employees who were fined. A November 3, 1965 letter, to employees, who had been fined 50 percent of earnings, noted non-payment in full and requested that the employee contact the business representative of the Union regarding payment "since we are now in the process of turning all fines over to our attorney for collection. Failure to do so could cause your fine to be increased to $450 as was noted at your trial." A letter of February 2, 1966, sent to an employee who had been fined $450, and signed by the Union's attorney, states that the matter has been referred

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[2] There is no evidence that anyone was found not guilty. In addition to the fine, the employee, depending on his years of employment was barred from holding union office for periods of 1 to 5 years. Employee Thomas, a witness called by Respondent, whose fine had been reduced from $450 to 50 percent of earnings, during the strike at Boeing, testified that in September, 1968, about 2 weeks before the instant hearing, as a result of his plea of personal hardship to the union membership and to a new administration in Lodge 405, his fine was reduced to $20.

[3] This 50 percent policy, according to Higgins, was initiated in the "first part" of 1966.

[4] In letters notifying employees of the fines imposed, the right of appeal to the president of the International Union, pursuant to the constitution, was mentioned. There is no evidence that any appeals were taken.

to the attorney for collection.[5] The letter then sets forth a demand for the $450 and advises that [5] failure to respond promptly "will require our filing suit against you, with the additional cost to you of attorney fees and courts costs incurred by the Union in the process, plus legal interest."

The record also discloses that the Union cited employees on a petition for money judgment in the City Court of New Orleans. For instance, a citation, dated April 11, 1966, shows the amount as $630 "with legal interest." The figure of $630 was based upon $450 for the fine, plus $180 attorney's fees. Boeing undertook to defend the suits against individual employees but made no general communication of this policy to employees. Thus, the employee cited in the April 11 action, above, contacted Boeing's Labor Relations Manager, Nau, about the citation. Nau referred the employee to the Company's attorney although Nau advised the employee that he could retain his own attorney is he wished.

The Resignations

At an earlier point, one of the categories of employees involved in the instant case was described as alleged resignees from the Union. It is now appropriate to describe and determine the facts regarding the alleged resignations.

Nau testified that, in 1962, in a period when there was a hiatus in the contractual relationship between the Union and Boeing, that the practice was for union members who wished to resign from the Union to send a registered letter to the Union and to the Company, stating that they wished to resign their membership and to have their dues deduction authorization cancelled. Nau states that in past years, including 1962, this practice was recognized by both parties. Higgins testified that there was no provision in the constitution allowing resignation by sending a letter to the Union and no by-laws or practices of Lodge 405 permitting members to resign their memberships. Higgins was then asked by Respondent's counsel about "testimony here by Mr. Nau with respect to an employee who dropped out of membership in Local 405 during the period of time when

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[5] The particular letter was sent to Katz who had allegedly resigned from the Union prior to working during the strike.

there was no contract in effect, in 1963." [6] Higgins testified that no employee "dropped" from the Local but Higgins went on to describe some employee who had never been a member in the first place and, from whom, in any event, the Union had never received a letter.

It is the Examiner's opinion that in the past, in 1963, when the Michoud plant was represented by District Lodge 751, the Michoud plant management, the Labor Relations Manager, believed and so advised personnel when such matters arose, that, in a no-contract period, an employee, who wished to resign from the Union and to discontinue authorization for check off of dues, could do so by writing to the Company and to District Lodge 751, both in Seattle. The extent to which employees availed themselves of this procedure is unclear but apparently no issue arose between the Company and District Lodge 751 [7] on the matter and the Company had no reason to believe that its understanding of the procedure was disputed.

[6] The evidence reveals, in many respects, a general orientation toward Seattle of Company and Union relations at the Michoud plant. This situation arose from the fact that Boeing's corporate labor relations office was in Seattle and that city was also the situs of, and the area embraced by, District Lodge 751. When the 1963-1965 contract was entered into, District Lodge 751 was the union organization representing the Michoud employees. The contract provided in its union security clause that those employees who were not union members and who did not wish to join the Union were obliged to write to the Company in Seattle and to District Lodge 751 in Seattle stating that fact. The Company, in he past, in notices to newly hired employees, set forth the above provisions, including the Seattle addresses of the Company and District Lodge 751. There is no evidence that the contract or the company notices were amended in the above respects after Lodge 405 came into existence at Michoud. Nor is there evidence that, when a new Michoud employee wrote such letters to the Company and to District Lodge 751 in Seattle, Lodge 405 contended that such letters by a Michoud employee were ineffective

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[6] Nau's testimony was as described above.

[7] Lodge 405 was not yet in existence.

under the contract because the letters had not been addressed to Lodge 405.

This Seattle orientation was also present in the 1965 period when the events herein involved occurred. Thus, the contract negotiations for the various units, including Michoud, were conducted on the basis of one contract embracing various units and locations.[8] These negotiations were held in Seattle. Also, in 1965, before the strike, Nau advised his labor relations staff people of the Company's position if confronted with inquiries regarding withdrawals from the Union when, by lapse of the contract, there might be no contractual obligation to maintain union membership. This intra-management communication read:

* * *

1. The Company does not encourage or discourage anyone from withdrawing his membership from the Union . . . .
2. The Company cannot assure the employees that sending a letter will terminate his membership in the Union. However, in the past, the procedure has been to send a registered or certified letter to the Union and to the Company in Seattle stating he wishes to terminate his membership in the Union and to cancel his payroll authorization for Union dues deductions.

   [There are then listed the full name and Seattle address of District Lodge 751 and the name and Seattle address of the Company, to wit, "Corporate Labor Relations Office." Neither the Company's Labor Relations office at the Michoud plant nor Lodge 405 at Michoud were memtioned.

Around September, 1965, various employees at Michoud spoke to their supervisors or other management people about how they could resign from the Union. The evidence reveals that, in substance, they were told that it was necessary to write a registered or certified letter of resignation to the Company and to District Lodge 751 in Seattle. There [7] is no evidence that the Company solicited or initiated withdrawal inquiries or withdrawal action by the

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[8] The subsequent strike occurred at all locations.

employees but the Company did respond to inquiries as aforedescribed.

Beginning about September 16, 1965 and on various succeeding dates in September, over 100 employees wrote, to the Company and to the Union (District Lodge 751) in Seattle, certified or registered letters of resignation. In substance, the writer said that he no longer wished to be a union member or that he was resigning from the Union. By letter of November 4, 1965, Lodge 405 stated to Nau:

> Attached is a list of Boeing employees who wrote certified letters, either to District 751 or Local 405, terminating their membership in the International Association of Machinists and Aerospace Workers. [The list of names attached numbered 235].

Although we have not yet described Respondent's principal contention regarding the resignations, Respondent does make, in its brief, a subsidiary contention that is, in effect, that assuming, arguendo, that employees could resign from the Union, the resignations should have been addressed to Local 405. In support of this position Respondent states that the Michoud employees "signed Local 405 membership application cards and payroll deductions are made locally."[9] To further present the contention in its full strength, the Examiner will also state that there is no doubt that the Michoud employees were members of Lodge 405 in September, 1965, and not members of District Lodge 751.

While it is probably true that from the standpoint of legal precision, Lodge 405 should have been an addressee for the resignations, the evidence which we have described above in detail leaves no doubt in our mind of the substantial history of Seattle orientation of union and management matters at Michoud. The contract that was in effect until September

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[9] Before Lodge 405 came into being the Michoud employees signed District Lodge 751 union application cards. Those who had so signed were not thereafter required to sign Lodge 405 cards when that Lodge came into existence. For a time, after Lodge 405 came into existence, District Lodge 751 cards were used at Michoud but this ceased when Lodge 405 became functional and had its own cards. The evidence indcates that at one time dues checked off at Michoud were remitted to Seattle but, when Lodge 405 came into being, it received the checked off dues directly from the Company.

15, 1965 specifically mentioned only the Seattle offices of the Company and the Union, District Lodge 751 in Seattle, as the bodies to be notified if an employee did not wish to join the Union. This and the other factors we have previously mentioned would not unnaturally lead to the belief that the Seattle formula was also applicable to resignations. Also, there can be little doubt of the fact that the Seattle labor relations office of the Company informed its Michoud counterpart of Michoud communications that it received and that a similarly close liaison existed bewteen District Lodge 751, in some respects the ancestor or parent of Lodge 405, and the latter. The letter of November 4, 1965 from Lodge 405 to Nau fully supports the conclusion that Lodge 405 was fully aware of the resignation.[10]

[8] Respondent's basic position is that the resignations were an exercise of futility and that regardless of where or when they were sent or received, Respondent regarded and regards them as having no effect. Charges were filed and trials conducted against those employees who worked during the strike irrespective of resignations.[11]

The reason advanced by Respondent for disregarding the resignations is, in substance, that there is no provision for voluntary resignations under the constitution or by-laws. The constitution provides that membership may be cancelled where a member is delinquent for 3 months in the payment of dues or special levies. There is also a constitutional provision for honorary withdrawal cards to a member who ceases working at the trade or who becomes a supervisor. Higgins testified that the union position at the time of the purported resignations was that the employees did not have the right to resign from the Union.[12] This continues to be the union position.

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[10] The resignation letters addressed to Seattle, were sent to Lodge 405 and received by the latter about October 15, 1965.

[11] Higgins testified that if an employee had sent in a resignation he was not charged and tried if he had not worked during the strike. The converse was also true, that is, the employee who had resigned, was charged and tried, if he had worked during the strike.

[12] Higgins referred to the constutional provisions above and the absence of any provision for resignation. Higgins did, however, testify that a member could resign "by death."

The Allis-Chalmers Decision and Reasonable Fines [13]

The applicability of the Allis-Chalmers decision to the present case is apparent, but, preliminarily, it is appropriate to describe and to understand the holding in that case since the doctrine of unreasonable fines, which is advanced by the General Counsel in the instant case, is distilled from the Allis-Chalmers decision.

The majority of the Supreme Court held, in substance, that "the body of Section 8(b)(1)[(A)] [which prohibits restraint or coercion by a union of the rights of employees to engage in or to refrain from engaging in union activities as guaranteed in Section 7 of the Act]" does not proscribe "the imposition of fines and attempts at court enforcement . . . ." [14] The Court stated: "Our conclusion that Section 8(b)(1)(A) does not prohibit the locals' action [of imposition of fines and court action to collect the fines] makes it unnecessary to pass on the Board holding that the proviso protected such action." [15] The critical role of court enforcement of fines as a significant factor in appraising the union conduct, and a further [9] indication of the non-determinative role of the proviso in the majority's decision, is found in the comment regarding the fact that one of the local unions in Allis-Chalmers had notified strikebreaking employees that they might be subject to a $100 fine for each day they worked. The Court said that ". . . no inference can be drawn from that notification that court enforcement would be the means of collection. Therefore, at least under the proviso, if not the body of Section 8(b)(1), such

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[13] *N.L.R.B. v. Allis-Chalmers Manufacturing Company*, 388 U.S. 194 (1967).

[14] In reaching this conclusion, the majority had perceived "inherent imprecision" in the words "restrain or coerce" in Section 8(b)(1)(A) and, in its view of the legislative history, Congress did not intend to interdict, as "restraint or coercion" the imposition of fines and court enforcement thereof. The majority also stated that "weak" unions would be disadvantaged if court enforcement of fines were encompassed in the prohibition of Section 8(b)(1)(A) and that therefore it had not been intended to interdict such conduct.

[15] Immediately following the body of Section 8(b)(1)(A), described above, is the proviso "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

notification would not be an unfair labor practice." At another point, it is said that "Assuming that the proviso cannot also be read to authorize court enforcement of fines, a question we need not reach . . . ." [16]

In upholding the imposition of fines and the court enforcement thereof, the Court, in the course of its opinion, at several points used the term "reasonable fine." Thus, at page 183: "Where the Union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine"; at page 192: "There may be concern that court enforcement may permit the collection of unreasonably large fines. However, even where there is evidence that Congress shared this concern, this would not justify reading the Act also to bar court enforcement of reasonable fines." In a footnote on the same page it is stated that "It is not argued that the fines for which court enforcement was actually sought were unreasonably large."

Accordingly, we find an implied requirement that the court enforceable fine must be "reasonable" or not "unreasonably large." Having rejected the position that the high water mark of internal union discipline of members regarding fines or other strictures was the right of expulsion from membership, what remained was the conclusion that a union could fine its members and enforce the fines in court without violating Section 8(b)(1)(A). Since the Act, under the foregoing construction, supplied no standard or limitation on the amount of the fines, the standard of reasonableness, often invoked in legal construction, was apparently invoked as appears from the above excerpts in the Allis-Chalmers decision.

We proceed, therefore, on the basis, as indicated by the Court, that under the body of Section 8(b)(1)(A) the fine imposed and enforced or sought to be enforced must be "reasonable."

The principal or sole point of reference in Allis-Chalmers to determine what is a reasonable fine or one that is not "unreasonably large" is the actual amount and circumstance of the fines in that case. The factual circumstances are most fully described in the Trial Examiner's decision,

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[16] Elsewhere the Court did perceive "cogent support" for its interpretation of the body of Section 8(b)(1)(A) in the provision.

adopted by the Board, and not disputed in the Court of Appeals or in the Supreme Court.[17]

In Allis-Chalmers, Local 28 struck the Company from February 2 through April 20, 1959. On February 24, 1959, 248 notified employees who had crossed the picket line to work that they were subject to a fine of up to $100 per day for each day's activity. Between February 2 and June 30, 1959 charges were filed with 248 against the strikebreakers. By September, 1959, 172 members had been fined $20 to $100. On September 18, 1959, 248 demanded [10] payment of the fines. On October 16, 1948, 248 again asked for payment, citing a Wisconsin case holding that fines were enforceable. On April 21, 1961, 248 notified each fined member of the action of the U.S. Supreme Court in the Wisconsin case and warned that a continued failure to pay the fines would result in the case being turned over to counsel "for civil suit." Local 401 struck at another installation of the Company from February 2 to April 19, 1959. After trial, it fined strikebreakers $100 each on July 11, 1959. On August 29, 1961, 248 took a pilot case to court against a strikebreaker who had been fined $100. Plaintiff was successful on April 26, 1963. Appeal was pending. A suit by 401 against one of its strikebreakers was pending. In 1962, both 248 and 401 had a similar situation as described in earlier years. In 1962, the actions of the Unions were similar to their earlier actions and strikebreakers were fined $35 to $100 by 248 and 401 fined its strikebreakers $100. In 1962, however, there were no threats of court enforcement nor warnings of court action. A high percentage of 148 strikebreakers paid fines in 1962 and all 401 strikebreakers paid.

Aside from initial general descriptions of the factual situation in the case, the Allis-Chalmers decision devotes little space to factual details but is principally concerned with the broad legal issues of the case. Perhaps the most

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[17] Local 248, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and *Allis-Chalmers Manufacturing Company*, 149 NLRB '67, 75-76; *Allis-Chalmers Manufacturing Company v. N.L.R.B.*, 258 F.2d 656, 657 (C.A. 7); *N.L.R.B. v. Allis-Chalmers Manufacturing Company*, 388 U.S. 194, 192, ft.n. 30.

specific comment made by the Court about the actual fines in Allis-Chalmers is as follows: [18]

> The notification by Local 248 to its strikebreaking employees that each day they continued to work might constitute a separate offense punishable by a fine of $100 was sent only to members of Local 248, not those of Local 401, and only during one of the two strikes called by Local 248. The notification was sent only to those employees who had already decided to work during the strike. Most important, no inference can be drawn from the notification that court enforcement would be the means of collection. Therefore, at least under the proviso, if not the body of Section 8(b)(1), such notification would not be an unfair labor practice. It is not argued that the fines which court enforcement was actually sought were unreasonably large.

An appraisal of the factual situation in Allis-Chalmers sheds little light upon what standards the conclusion was reached, as it quite apparently was, that the fines were reasonable or not unreasonably large. All we know is that, in that case, fines of $20 and $100 on strikebreakers, who worked during two strikes that lasted over two months each, was reasonable. We do not know if the Court would regard the actual imposition, as threatened in Allis-Chalmers, of a fine of $100 per day for each strikebreaker, as reasonable. It is this lack of a standard or guideline in determining reasonableness that presents a problem. And this is a problem that may arise in every case involving fines and threatened or actual court enforcement of the fines. We can conclude that, in those cases that arise where the striker lasts more than 2 but less than 3 months and the fine is $20 or $100, the fine is reasonable.[19] [11] But suppose the fine is $150, $200, $300, $400 or some other figures for a strike of similar duration. What is the standard in a one month strike, a six month strike or a strike of some other

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[18] Page 192, ft.n. 30.

[19] To be on all fours with Allis-Chalmers, the comparative strike situation must also include a warning of fines to individual strikebreakers during the course of the strike and not deferment of threats of, or imposition of, fines until after the strike.

duration. In this connection, the basic nature of the problem was recognized by the dissenting justices in Allis-Chalmers in the following observations (page 204):

> In this case, each strikebreaking employee was fined from $20 to $100, and the Union initiated a 'test case' in state court to collect the fines. In notifying the employees of the charges against them, however, the Union warned them that each day they crossed the picket line . . . might be considered a separate offense punishable by a fine of $100. In several of the cases, the strikes lasted for many months. Thus, although the Union here imposed minimal fines for the purpose of its 'test case', it is not too difficult to imagine a case where the fines will be so large that the threat of their imposition will absolutely restrain employees from going to work during a strike . . . of course, as the Court suggests, he [the fined employee] might be able to defeat the union's attempt at judicial enforcement of the fine by showing it was 'unreasonable' . . . but few employees would have the courage or the financial means to be willing to take that risk (citation omitted)."[20]

In his brief, the General Counsel, recognizing, at least in some degree, the decisional task of determining what is a reasonable fine, states that "Since neither the Board nor Courts have established any criteria in this type case for determining what constitutes a reasonable fine, all relevant factors should be considered." We would agree with this observation although the "relevant factors" are almost as recondite as what is "reasonable" since the Court has not informed us what are the hallmarks of reasonableness. If

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[20] Aside from these observations, the contests, of whether particular fines in particular strikes of various types and duration are unreasonable or not, could find their way individually to the Board. Without a standard by which to determine reasonableness, this task could be formidable. Conceivably, the administrative task could be lessend by deciding that almost any duly enacted fine, short of outright confiscation, was reasonable but leaving to a patchwork of state court decisions the determination of whether the particular court would actually enforce a fine that it might consider unreasonable or excessive. Surely this approach cannot be recommended as the lot of individual employees covered by Section 7 of the Act and by Section 8(b)(1)(A) even as the latter has been interpreted in Allis-Chalmers.

we knew even one standard of reasonableness as to the Allis-Chalmers fines, the relevant factors therein could be determined. All that can be said is that in that case, where strikebreakers worked about 2½ months and earned possibly between $2.50 and $3 per hour, or possibly $1,000 overall, whereas if they had not worked as required by the union rules they would have earned nothing or would have received possibly appreciably less in strike benefits, a fine of $100 or $20 and court action thereon is reasonable. But, again, at the risk of belaboring the point, what is reasonable if the fine was some other amount or if the strike was of different duration.[21]

[12] The various factors, submitted by the General Counsel as relevant in assessing the reasonableness of the fines in the instant case and as supporting his contention that the fines were unreasonable and excessive, are as follows:

The General Counsel cites Section 8(b)(5) of the Act. This section provides that it is an unfair labor practice for a union, in situations where a contract requires union membership as a condition of employment, to require payment of a membership initiation fee in an amount "which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

It is therefore argued, in effect, that the wages of the strikebreakers and other economic factors pertaining to them should, by analogy to the factors deemed relevant in Section 8(b)(5); be considered in the instant case.

While we do not have a Section 8(b)(5) situation before us[22] and cannot say that the standards set forth in that

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[21] We mention amount of the fine and duration of the strike because these were the only factual elements that appear in Alli-Chalmers. The Court evinced no interest in any other factors and did not comment specifically on either factor that was present other than to observe that no one had argued that the fines were unreasonably large. As we shall see, there are other considerations that have at least potential relevance on the question of what is a reasonable fine.

[22] Fairly typical Section 8(b)(5) cases are: *Television and Radio Broadcast and Studio Employees, Local 804 . . . (Triangle Publications, Inc.)*, 135 NLRB 632, enforced 315 F.2d 398 (C.A. 3); *Local 839, Motion Picture Screen Cartoonists (I.A.T.S.E.)*, 121 NLRB 1196.

section govern the instant case, the considerations in that section, and in the decisions applying it, do manifest, in some degree, congressional, Board, and court thinking on the matter of unreasonable or excessive union fees. An initiation fee and a fine are of course distinguishable but both represent an exercise of union power as to membership obligations of employees; and regarding the initiation fees, at least, we have some guidelines by which a fee is judged reasonable or excessive.

The employees involved in the instant case normally earned approximately $2.38 to $3.63 per hour which would mean about $95 and $145 per 40 hour week, respectively. The fines were $450, although under certain conditions described earlier in this decision, individual strikebreakers had obtained a reduction from the $450 fine to a fine in the amount of 50 percent of the strikebreaker's earnings at Boeing during the strike.[23]

It is pointed out by the General Counsel that the $450 fine alone, even without the $180 attorney's fee for a total of $630, is more than 4½ times the weekly earnings of the lowest paid strikebreakers.[24] [13] We ourselves likewise observe that 450 is more than double the weekly earnings of the highest paid strikebreaker. The General Counsel also characterizes $450 as "exorbitant" when compared with the union's initiation fee of $10 and the monthly dues of $5.60 or $66 per year.

Another factor that the General Counsel urges as supporting the contention that the fines were unreasonable is the fact that Hurricane Betsy had struck the New Orleans area a week before the strike. The hurricane caused extensive damage in the area, affecting among others, the employees, their homes, families, possessions, and transportation. The record does not show how much each

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[23] Atypical and not properly part of the general picture of the amount of the fines, is the case of a strikebreaker who, in 1968, two weeks before the instant hearing, secured a reduction in his fine to $20., *supra*.

[24] In using the term "strikebreakers" to describe employees who worked during the strike, no value judgment is intended. We use the term simply as a convenient one word description rather than the longer phrase of "employees who worked during the strike." Both the majority and the dissenting opinions of the Supreme Court in Allis-Chalmers used the term "strikebreaking employees" is referring to those who worked during the strike.

individual strikebreaker, over 160 in number, was affected by the hurricane nor how the more than 10 times as many employees who did not work during the strike were affected. There is testimony from a few strikebreakers as to how they were affected by the hurricane.[25] In some degree the testimony may be regarded as illustrative of the type of problems that beset people in the area, involving strikebreakers and non-strikebreakers. Undoubtedly some people suffered more an dsome less but unless an individual survey was made of some 1500-1900 employees in the unit, we can do little more than conclude that the hurricane adversely affected the area and its people from the economic standpoint.

In the same connection, the record shows that the Michoud plant was severly damaged by the hurricane and was closed for 3 or 4 days, reopening just a matter of a few days before the strike. Nau had spoken to Higgins with regard to the impending multi-unit strike by the Union against Boeing. Nau urged that, in view of the effect of the hurricane on the Michoud plant and its employees, Higgins should request the International Union to exclude the Michoud plant from the coming strike against the various Boeing installations. Higgins responded negatively.

Higgins testified that the Union did take the hurricane situation into consideration regarding the fines. He states that he personally had thought that the fines should be more than $450 because he believed some strikebreakers had earned more than $450 by working during the strike. The reduction of the $450 fines to 50 percent of earnings during the strike was attributed by Higgins to consideration of the effects of the hurricane on employees. We believe that this may be partially true but the reduction was due to other factors also and the reduction did not apply ipso facto simply on the basis that all strikebreakers had been affected by the hurricane. Thus, as earlier, described, the reduction of the $450 fine, to the 50 percent of earnings basis, was not accorded to all strikebreakers but only to those who appeared at their trial, confessed their wrongdoing, and affirmed a desire to be good union-members in the future.

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[25] For instance, 30 inches of floodwater in the home, destruction of lifetime possessions and property, large family in stringent financial straits for basic necessities.

No notice was issued that the above formula was being or would be followed.[26]

[14] We have before us, therefore, a variety of factors that, the General Counsel asserts, demonstrate that the fines in the instant case were unreasonable. These factors include the amount of the normal earnings of the employees and the normal dues and initiation fees, as well as the severe economic consequences of a hurricane that struck the area shortly before the strike.

It is our opinion that normal earnings and the amount of the regular dues and initiation fees are relevant considerations. The normal earnings are particularly important in a situation, such as here, where the charges and fines did not occur until after the strike and where there were no prior warning of a specific fine for working during the Michoud strike or of the possible amount of the fine.[27] It is apparent that such fines will probably have to be paid from normal earnings and that whatever earnings there were during the strike were probably spent as normal living expenses, without saving part thereof for an expected future fine of $450.

From the standpoint of the Union, however, a more important consideration would be that the strikebreakers received earnings during the strike. These earnings were received as a result of violating membership obligations not to work during the strike and the strikebreakers' earnings are in contrast to the lack of earnings of the loyal union members.[28] It is thus apparent that both normal

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[26] Both the Union and the Company had taken steps to relieve suffering caused by the hurricane. Upon application by an individual and after investigation, a special fund set up by the International Union was the source of payments of $124 to employees who were seriously affected by the hurricane. Thomas, a witness called by the Union, who was a strikebreaker, testified about there being 30 inches of water in his house as a result of the hurricane and about he and his wife and eight children then sleeping on the floor of his uncle's apartment, occupied by his uncle's own large family. Thomas applied to the Union for the $124 relief and his uncontroverted testimony is that Higgins told him he was not eligible since he worked during the strike.

[27] Respondent, moreover, had never before fined any of its members.

[28] The strike occurred through 18 calendar days, including 3 Saturdays and 3 Sundays. Different strikebreakers, of course, had different rates of pay and worked either a few days or many days during the strike. As provided in the expired contract, bonus or premium rates were earned by some employees for

earnings and earnings secured during the strike are relevant considerations in evaluating the reasonableness of the fines.

As to normal dues and initiation fees of the Union, they, like normal earnings, have relevance because they are indicative of the amount of the economic obligations that normally exist between the Union and its members. For dues of $5.50 per month or $66.00 per year, the normal financial obligation of a member to the Union is discharged. From such a standpoint, a fine of $450 is a major escalation in financial obligation.

Then we come to the economic consequences of the hurricane and the attendant economic and personal pressures therefrom that had been placed upon individuals who worked during the strike. The difficulty of assessment in this area as to relevance on the amount of the fines is apparent. In promulgating or administering a penalty where a large number of individuals is involved there are two somewhat conflicting considerations. One consideration is a desire for uniformity in order to avoid contentions of partiality but another consideration is the desire to assess guilt on an individual rather than on a group basis. Uniformity also makes for ease of administration as contrasted with the time and difficulty entailed in [15] arriving at varying individual penalties. Does a reasonable fine in the instant case necessitate a differentiation between two strikebreakers, one with three children and one with eight. Suppose one strikebreaker had a dependent mother-in-law and a spastic child requiring special medical attention. Should the fine be different for a man who had 30 inches of water in his house whereas another had only 2 inches. All sorts of differentiations are possible, including values of destroyed or damaged cars, furniture, and so forth that varied in individual case; children or no children; working wives and many types and degrees of individual financial obligations. How is the adjudication in any of the foregoing types of situations of strikebreakers to be affected if the non-strikebreakers had equivalent or greater numbers of children, personal problems, and damage to property.

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weekend work or for work properly classed as overtime. Varying pay rates, lesser or greater days worked, plus the existence or non-existence of premium pay in individual cases, would give a wider range of earnings.

Perhaps a conclusionary and determinative assessment of the various factors of normal earnings, initiation fees, dues, strike earnings, hurricane, individual situations of strikebreakers, as guidelines to what is a reasonable fine, is not necessary. None of these elements were presented to the Court in Allis-Chalmers and as far as appears the Court evinced no interest in such real or potential factors in arriving implicitly at its conclusion that the fines in that case were reasonable or not unreasonably large. It can be said that since the firms in Allis-Chalmers were $20 and $100 for working during a 2½ month strike, the instant fines of $450 for working during an 18 day strike were unreasonable. It can also be said that in the cited case there was ample advance warning not only that strikebreakers would be fined but also that the fines could be severe.[29] In the instant case there was no warning before or during the strike that fines would be imposed and, of course, no indication of the amount of severity of the fines.

While the foregoing approach is temptingly available, the Examiner believes that the parties, as well as other employees, unions, and employers, are entitled to some explication of what are the elements that make one fine in one strike reasonable and which factors in another strike might make certain fines unreasonable. It scarcely is helpful or enlightening to conclude that only a $20 or $100 fine is reasonable regardless of the length of the strike and regardless of other factors that we have touched upon above. A fine of $100 in a one day strike and a fine in the same amount for working during an 8 month strike are surely not the same as to reasonableness even if we disregard every other variable factor.

A determination of whether the instant fines are reasonable or unreasonable should itself be based on a formula that has a reasonable basis. The reasonableness of the basis or standard will be the more evident if it is reasonable not only with respect to the instant case but has general applicability to other strikes and to other strikebreakers. A measure of predictability in such situations would certainly be of help to employees, unions, employers, to the General Counsel of the Board, and to those charged with

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[29] At one point the Allis-Chalmers strikebreakers had been notified that their activities could subject them to a fine of $100 per day worked.

adjudicatory responsibilities. While Allis-Chalmers may have decided reasonableness in that case, the lack of explication of any basis for the conclusion limits its general applicability as a guideline.

[16] A fine by its nature and definition is a punishment. Punishment has the elements of retribution, deterrence, prevention and reformation. The latter three elements are generally accorded greater weight in our contemporary society than is retribution in dealing with non-conformity or wrongdoing in the various facets of human conduct. In a regulatory and remedial statute such as the Act the sanctions are not punitive or retributive in nature. We therefore are of the opinion that while the Supreme Court found that the Act vested in a labor organization the protected right under the Act to impose reasonable fines and to seek court enforcement thereof, it was not intended, we believe, that such fines should be punitive or retributive. This conclusion, in some degrees, finds confirmation in the fact that the Court used the term "reasonable" in connection with fines.[30]

Since we believe that the fines with which we are concerned should be essentilly deterrent in nature, the question is, how much deterrence. A deterrent can be total or virtually total or it can be partial or less than total. Without reference to larger fines, it would appear that a fine of $100 per day and court enforcement thereof on a strikebreaker, earning average industrial wages, is a total deterrent to any union member working during the strike. We also believe that a fine in the total amount of what the strikebreaker earned by working during the strike is a total deterrent.[31] There can be a variety of fines that are less, in effect, than total deterrents but are nevertheless deterrents in varying degrees. Probably fines in amounts of more

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[30] It is probably true that a punishment such as a fine may have an inherent punitive element. The deterrent factor, however, is properly predominant as contrasted with a situation where far and beyond any reasonably deterrent, it is evident that a puntive result is being imposed.

[31] Employees who are warned before or during the strike of fines of the two aforementioned types would normally not work, especially if there had been a few test cases with such court awards staring them in the face. Such fines, if imposed after the strike, without prior warning would deter working in any future strikes.

than 50 percent of earnings during a strike but less than 100 percent are also total deterrents for all practical purposes. This is most evident if the percentages exacted are 80 or 90 percent. The more difficult question arises when the percentage is 50 percent or some percentage above or below that figure.

Before endeavoring to discern whether the Supreme Court was speaking of a reasonable fine in terms of total or partial deterrence, it should be made clear that the Examiner believes that the Allis-Chalmers doctrine of reasonable fine is most appropriately interpreted in terms of the relationship of the amount of the fine to the earnings of the strikebreakers during the strike. We believe that such a standard, given the Allis-Chalmers decision regarding the right to impose and to collect fines in court, is basically equitable. The elements of normal earnings in non-strike periods, the amount of initiation fees and dues and other factors, are taken into consideration in determining what percentage of strike earning may be assessed by fine. If the percentage of earnings during a strike, that can be properly extracted by a fine, can be determined by some equitable standard, then we are prepared to submit such a fine as being the reasonable fine contemplated by the Court in Allis-Chalmers. Further, if such a standard of formula can be evolved it would be readily [17] understandable by employees, unions, employers and all other concerned parties interested in their respective rights and obligations in this matter of fines.

Having previously narrowed the nature of the fines that concern us to fines that are deterrents, we return to our consideration of whether the deterrence envisaged by the Court was total deterrence from any work during the strike or less than total deterrence. The resolution of this matter is initially essential since if the Court was sanctioning total deterrence then a fine of 100 percent of total earnings might be the reasonable fine envisaged, with any greater amount of fine being unreasonable. Conversely, if the Court did not contemplate total deterrence, our problem is to ascertain the percentage of earnings extracted by fine that equates with the degree of partial deterrence that the Court would consider reasonable.

An important portion of the reasoning of the majority of the Court in reaching its basic decision in Allis-Chalmers was the strong and weak union analogy. Thus,

> It is no answer that the proviso to Section 8(b)(1)(A) preserves to the Union the power to expel the offending member. Where the Union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine. Where the Union is weak, and membership therefore of little value, the Union faced with further depletion of its ranks may have no choice except to condone the member's disobedience [unless it can impose fines and enforce them in court]
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> * * *
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> At the very least it can be said that the proviso preserves the rights of unions to impose fines as a lesser penalty than expulsion . . .
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> . . . to interpret the body of Section 8(b)(1) [as applying to the imposition and collection of fines but not to expulsion would be making a distinction between court enforcement and expulsion [which] would have been anomalous . . . such a distinction would visit upon a member of a strong union a potentially more severe punishment than court enforcement of fines, while impairing the bargaining facility of a weak union by requiring it either to condone misconduct or deplete its ranks.

The concurring opinion of Mr. Justice White who constituted the fifth member of the court majority is based almost exclusively on the strong and weak union reasoning, above, in Mr. Justice Brennan's majority opinion. The same reasoning was also the subject of critical comment in the dissenting opinion written by Mr. Justice Black and concurred in by three other justices.

Our attention to the strong and weak union comments of the Court is based on our interest in the question of whether they tell us anything about the Court's views on deterrence. Evidently the Court views a "strong" union as one that posesses a deterrent power over its members [18] that a "weak" union does not possess. A strong union, according to the court, is one whose membership the members view as "valuable" and therefore expulsion is a more severe penalty than court enforcement of fines. A

weak union is one where membership is of "little value" to the members and therefore expulsion is no deterrent.

If, as the Court states, expulsion from a strong union is a more severe penalty than a court enforced fine, then such expulsion or power to expel by a strong union is probably equivalent to total deterrence. In other words, when the strong union, of which the court speaks, strikes an employer, the union members will not work because the Union cannot only fine strikebreakers and enforce the fine in court but can, if it chooses, impose the greater penalty of expulsion from membership. If expulsion is a greater penalty than the court enforced fines then the loss of membership can probably be presumed to be a greater economic loss to the member than would a court enforced fine. It is doubtful than in the majority of cases unadulterated loyalty to the Union or sentimental attachment to the concept of membership is the element that makes loss of membership a greater penalty than a court enforced fine. Moreover, the Court in describing a strong union as one where the membership was "valuable" was using a term not generally used to describe pure loyalty or sentiment. The Court, in the same sense, described a weak union as one whose membership was of "little value." Nothing was said about comparative loyalty of members in different unions but the comparative description was solely in terms of the value of the memberships. Perhaps it may be said that the aforementioned strong union in a plant, since it would have secured better contract terms than would a weak union, was in that sense the Union whose membership was more valuable. This is true to some degree but the same beneficial contract terms would continue to accrue to the member expelled for strikebreaking so that expulsion, realistically, in such a situation, would not be a penalty that was greater than a court enforced fine.

It is reasonably apparent, in our opinion, that the strong union, membership in which is so valuable that expulsion therefrom is a greater penalty than court enforced fines, is most likely a craft union in an industry where membership in that union is essential to secure or to retain employment.[32] Expulsion from membership is therefore a severe

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[32] The efforts of minority groups to secure membership in certain unions is explainable primarily on the ground that employment in certain trades is not a

penalty and greater than court enforced fines. In such situations a high [19] degree of discipline is possible and there is little or no strikebreaking activities by members. We therefore conclude that expulsion from a strong union, which the Court described as a greater penalty than court enforced fines, is, for all practical purposes, equivalent to total deterrence to strikebreaking activity by members. The question then is, did the Court, while, in effect, recognizing that expulsion from a strong union was an exercise of total deterrence, intend or contemplate that a reasonable fine was one, the amount of which would totally deter strikebreaking, for instance, a fine of $100 per day. Or was a reasonable fine to be a fine that would deter strikebreaking but not totally eliminate any possibility that any member could, as a practical matter, work during a strike.

For several reasons, it is our opinion that the Court contemplated that a reasonable fine was one that would be less than a total deterrent to working during a strike. As we have seen, the expulsion of a member from a strong union is, in effect, total deterrence to strikebreaking or any other internal rule violation. But the Court, recognizing the aforementioned power of the strong union, said that the strong union could impose a lesser penalty than expulsion, to wit, fines and court enforcement thereof. By the same token, it was concluded that the weak union could seek court enforcement of fines because this was a lesser penalty than expulsion. Since expulsion by a strong union is equivalent to total deterrent and since the Court referred to court enforcement of fines, as a lesser penalty than expulsion, then a reasonable fine, enforceable in court, should not be so large in amount that it is equal to total deterrence. If

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practical possibility without union membership in specific unions. There are two aspects of the foregoing. One is the problem of the untrained and inexperienced to gain admission to the union apprenticeship program and then to become full-pledged journeymen. The other is that of a trained and experienced worker to gain union membership since membership is as essential to him as to the untrained. Under the Act, of course, membership in a union cannot be required as a condition of securing employment and in a union security contract retention of employment may not be dependent on union membership if that membership was denied or terminated on some ground other than the non-payment of initiation fees and dues. Legally, therefore, expulsion from union membership for anything except non-payment of dues is difficult to describe as a penalty more severe than court enforced fines.

this is not so, court enforced fines are not lesser penalties than expulsion by a strong union.

Another reason, for believing that a reasonable fine is one that is less than a total deterrent to any union member working during a strike, is the fact that, under the Act, the right to strike and to shut down the employer's operation is not unlimited. The Supreme Court has held that during an economic strike an employer has a right to protect and carry on his business by hiring permanent replacements for the strikers.[33]

In a less developed period of industry where a relatively high proportion of work was unskilled, the employer might effectively exercise his right to try to carry on his business by hiring people off the street, who had no particular skill or experience in the employer's operation. The employer could, of course, also employ striking employees who returned to work during the strike but, even if all strikers remained on strike, the employer still could resort to hiring replacements off the street. Today, to a great extent, many employers, including probably Boeing at the Michoud plant, could not operate in any degree, in a strike, as allowed by the Mackay decision, if all the regular experienced employees were subject to court enforced fines so large in amount that the total deterrence would exist as to any union employee who might, for him own reasons, wish to work. It is one thing for a union and its members, through loyalty, dedication, conviction and solidarity, to strike and to voluntarily remain on strike and thereby exert maximum economic pressure by closing down a plant completely, but it is another thing to obliterate all aspects of [20] individual freedom by court enforced fines of a private organization when the fines are so large in amount that no member could work. Section 7 and Section 8(b)(1)(A) of the Act underwent some attenuation in Allis-Chalmers but it is doubtful that they disappeared completely. If there is one thing reasonably clear regarding the enactment of Section 8(b) of the Act in 1947, it is that the Section was intended to prevent a union from affecting the employment of employees

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[33] *N.L.R.B. v. Mackay Radio & Telephone Co.*, 304 U.S. 333. In effect, this principle rejects the contention that the employer, by hiring strikebreakers, and thereby carrying on his business during a strike, is interfering with the right to strike, particularly since replaced strikers may lose their jobs.

except in the narrow area of nonpayment of dues under a union shop contract. A fine that is so great that it is an absolute deterrent to working prevents an employee from working and deprives him of employment. Again, if the fine is *per se* a total deterrent then we have total deterrence and this result is inconsistent with the court's definition of a reasonable fine as a lesser penalty than expulsion by a strong union, the expulsion being, as previously described, equivalent to total deterrence.

A further consideration in reaching the conclusion that a reasonable fine is less than a total deterrent is the nature of a union and its relationship to employee members. The union's strength, except in a non-free society, ultimately and in the long run, depends on the voluntary support and loyalty of its members. The objective of fines or other discipline would seen to properly be the rehabilitation of recalcitrant members into loyal members rather than further or complete alienation of the recalcitrants. The good and the bad members of the Union will continue to be employees in the plant represented by the Union. A reasonable fine, imposed on strikebreakers, that deters such activity, would appear more consonant with the term reasonable fine as used by the Supreme Court than would a fine so large in amount, accompanied by court enforcement and costs, that it is a total deterrent which quite possibly could completely alienate the member from any voluntary cooperation with, or support of, the Union thereafter.

As previously stated, it is our opinion, that a reasonable fine, in the context in which we are considering the term, should be based on a relationship of the fine to the strikebreaker's earnings during the strike. We have rejected, for reasons stated, total deterrence as compatible with a reasonable fine. This would eliminate a fine that is equivalent to 100 percent of earnings during a strike and it would eliminate any fine in a greater amount than such total earnings. The reasonable fine is, we believe, equitable and conveniently defined as a percentage of the strikebreaker's earnings, where the percentage of the earnings encompassed by by the fine is large enough to deter the normal employee from violating his obligation as a union member to refrain from working during a duly authorized strike but not so large that it completely eliminates, as a practical matter, all freedom of choice on the part of the employee to exercise

some measure of individual freedom as guaranteed under Section 7 and 8(b)(1)(A) of the Act.

Governed as we are by the Allis-Chalmers decision, it is apparent from the decision that a reasonable fine in the Court's contemplation was to be more than a token demonstration that the Union could impose some court enforced fine. The Court's focus on the situation of a "weak union makes it clear that the court enforced fine was to be a genuine deterrence to strikebreaking although, as we have previously stated, less than an absolute deterrence.

It is apparent that the choice of some specific percentage of earnings as being the reasonable fine contemplated by the Court will appear to be an arbitrary choice and, in a sense, the charge will be correct.

[21] But this is true of all line drawing. The Board requires a 30 percent showing of interest by a petitioning union before it will process a petition for certification as collective bargaining agent. The percentage is 30, not 29, 25, 31, 35 or some other figure. Individuals attain majority at 21, not 20 years and 6 months or at some other age. Voters must reside in a jurisdiction for 30 days, 3 months, 6 months or some other period before they may exercise their franchise.

It is the Examiner's opinion that a fine of 35 percent or less of a strikebreaker's earnings at his regular straight time rate is presumptively, a reasonable fine. We also believe that a fine of 80 percent or less of overtime or premium pay, earned by a strikebreaker, which he would not normally have earned but for the fact that his fellow union members were engaged in an authorized strike, presumptively, is a reasonable fine. We believe that a total fine embracing some earnings at the 35 percent or less rate and some earnings at the 80 percent or less rate is, presumptively, a reasonable fine.

The 35 percent or less rate on regular earnings is, in our opinion, an effective deterrence but not a total deterrence. If a strikebreaker's rate is $3 per hour and he works 5 days, 8 hours a day for 40 hours, his gross earnings are $120. Assume his normal deductions leave him $100 net pay. A fine of 35 percent on $120 in earnings is $42. His net take home pay is therefore $58. Taxes and other deductions will have been paid on the entire $120 he earned. His take home pay of $58 is equivalent to $1.45 per hour or less

than half his normal rate and less than the Federal minimum wage. His normal working expenses of transportation to and from the job, lunch, and work clothes would continue, of course, and would have to be paid out of his $58 take home pay. It is one thing to bear the foregoing expenses when the take home pay is $100 but it is something else when the same expenses are borne by $58 in take home pay.[34] It is also to be observed that the reality of all the foregoing factors would be evident whether there is specific warning of the fine before the commencement of the strike or whether the fine is imposed during the strike or after the strike. The financial impact might well be greatest where, without prior specific warning, the fine is imposed after the strike. In such situations the average strikebreaker would probably have used all or most of his earning to meet day to day needs of himself and his family without making provision for payment of a fine. His normal earnings would therefore be important.

An additional element that is relevant in establishing what constitutes a reasonable fine is the fact that in addition to the fine, the strikebreaker, during and after the strike, is usually subjected to considerable pressure by his fellow employees who remained on strike. Scornful epithets and remarks as well as alienation from friends or acquaintances both at work and in the community can be some of the pressures which the strikebreaker may incur. These pressures are not to be underestimated. The combination of such pressures or the prospect of such pressures when combined with the warning of, or the actuality of, a court enforceable fine of 35 percent or less of strikebreaker earnings, in our opinion, constitute a genuine deterrence. In the illustration which we gave previously, the employee might well conclude that the $58 a week to be garnered by going to work during the strike was not worth the candle.

[22] We there have little doubt that the formula regarding fines that we have described above and which we propose to apply herein is a genuine deterrence and that a maximum in excess of 35 percent of earnings would tip the scale in the direction of total deterrence, a result not

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[34] Using the same figures as above but assuming a fine of 50 percent of earnings instead of 35 percent, we have the following: Take home pay of $100 after normal deductions; 50 percent fine on $120 earnings; or $60; net take home pay is $40, equivalent to $1 per hour.

compatible, as we have explained, with the concept of a reasonable fine.

The next aspect of the formula to be considered is whether a 35 percent maximum is itself too much of a deterrence and too close to total deterrence. We would answer in the negative. Despite the fact that the formula provides a real deterrence, the individual employee could decide, in the illustration we gave, that while $58 in pay was not much for a week's work, it was to him and his family better than being at home or on a picket line with no earnings. Individual circumstances would undoubtedly enter into the decision. If the individual was convinced that he did not agree with the merits of the issue over which the strike had been called, this could be a factor in his decision. If the needs of a man's family were acute, this could be a factor. A man with substantial seniority might be concerned that he might be permanently replaced by the employer if he remained on strike. In some individual cases, various factors or a combination thereof might be enough to persuade the individual that the reasons for working were greater than the deterrence. In other cases, the deterrence to going back to work would prevail. And it is this kind of a picture, which we believe is reasonable accurate, that illustrates the difference between a partial, though genuine, deterrence and a total deterrence. We further believe that such a deterrence comports with the concept of a reasonable fine and that the formula described for fixing the fine is calculated to result in the aforementioned reasonable fine.

In stating what we considered to be the standards of a reasonable fine we used two figures. One figure was up to 35 percent of earnings of the strikebreaker which he earned at his regular rate of pay for his normal work day. The other figure was up to 80 percent of earnings of the strikebreaker earned at premium pay which normally he would not have earned but for the strike. The differentiation is based on the following considerations. There is, as we have seen, a combination of rights and interests that are to be balanced as equitably as possible in implementing the Allis-Chalmers doctrine that a union may impose a court enforceable reasonable fine. The strikebreaker, being an employee, has certain rights under the Act as does the employer and the Union. The fine at 35 percent of earnings

for work performed at regular rates for the normal work day [35] was, as pointed out, a genuine deterrence but not a total deterrence. The employee strikebreaker, albeit deterred from doing so by the 35 percent fine, could, nevertheless, work the same amount of time, at the same rate, with the same gross earnings as would have been the case but for the strike. By the same token, the employer would receive from the strikebreaker the same amount of work hours at the same pay as would have been the case but for the strike. The union's interest in defeating or minimizing the performance of work by its members during the strike is reasonably protected by the court enforceable fine of up to 35 percent of normal earnings. As pointed out previously, this fine is a genuine deterrence but not a total deterrence. As to some individuals the deterrence will prevail and they [23] will not work. Other individuals may react differently but there is, in our opinion an equitable balance of all factors and interests and that is our definition of the reasonable fine referred to in the cited case.

However, when the strikebreaker, instead of performing his normal amount of work at his regular rate, which would have been his right and custom but for the strike, performs overtime work in excess of 8 hours per day and 40 hours a week and works on week-ends so that he earns premium pay, a different situation exists. The strikebreaker is now profiting by the strike and is the recipient of what may be termed a windfall. He is no longer earning what he would have earned but for the strike but is affirmatively profiting by reason of the fact that his fellow union members are on strike and are obeying the union rule against strikebreaking, a rule which, of course, he is not obeying. He is no longer exercising simply the normal "right" of an employee to work as he would have worked but for the strike.

For each strikebreaker who is working at his normal rate and hours, there may be two, three, five, ten or more strikers who are not working at all. By working even at his normal rate and hours, the strikebreaker is affecting,

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[35] In other words, we are referring to a strikebreaker who before the strike worked 8 hours a day, 5 days a week at, for instance, $3.00 per hour. During the strike he works under the same conditions as to hours, days, and wage rate.

in some degree, the efficacy of the strikers' lawful strike. But the 35 percent fine, being a genuine deterrence, is in our view, a reasonable weapon in such situations since it will deter some, perhaps many, potential strikebreakers, but, being less than a total deterrence, it is not absolute. However, by working overtime at premium rates, the strikebreaker is materially going beyond protection of his own right to work normally and he is affirmatively performing not only his own normal work but is also performing the work of one or two strikers. This, of course, infringes substantially on the union's interest in waging an effective strike as the representative of the employees and it infringes on the rights of the strikers whose work is being performed by the strikebreaker in addition to his own normal work. When the strikebreaker performs not simply his own normal amount of work but the work of one or two strikers, he is, in a sense, cancelling the effect of the strikers' refusal to work and nullifying the effectiveness of the strikers' exercise of the right to strike. And the strikebreaker, whom we are discussing is, of course, a member of the Union, who by performing even his own normal work during the strike, has violated the rules of his union.

The foregoing reasons, therefore, are the basis of our use of a fine of up to 80 percent of earnings at premium pay which normally would not have been earned by the strikebreaker. We believe that the higher deterrence inherent in this aspect of the strikebreaking situation, although even here less than total deterrence, is equitable and, presumptively, constitutes a reasonable fine. Let us illustrate the matter by using the same hypothetical strikebreaker whom we used previously.

Assume the strikebreaker normally works 8 hours a day, 40 hours a week, at $3 per hour. His gross pay is $120. After normal deductions he would take home $100. He is fined at the 35 percent of earnings rate or $42. His net take home pay is, therefore, $58. However, assume that in addition to his normal amount of work and pay, he worked 20 hours overtime during the week at a premium rate of $6 (to use a round member). This increases his earning by $120. He also works 8 hours over the weekend at $6 per hour, for an additional $48. His total earnings for work beyond his normal 40 hours is $168. Assume that

after normal deductions he would have $138 left from the $168. If he was fined at the 35 percent rate on the $168, the fine would be $59. Deduct $59 from the $138 net, [24] above, and what remains is $79. His overall take home pay for the week is, therefore, $58, plus $79, or a total of $137. His normal take home pay for his normal hours at his normal rate would have been $100 but for the strike. Because of the strike and despite a fine of 35 percent on both normal and premium earnings, he now takes home $137. Despite the fact that he worked 68 hours in order to take home $137, he is better off financially than he was before the strike and strikebreaking is clothed with a silver, if not a gold, lining.[36] It is therefore reasonably apparent that a fine of 35 percent of earnings loses any reasonable degree of deterrence when it is applied to earnings from overtime work at premium pay which the strikebreaker would not have received but for the strike.

However, if the fine is 35 percent of normal earnings and 80 percent of overtime premium earnings, the following is the situation. Assume the same earnings figures as used previously in our illustration. The strikebreaker is fined 35 percent of his normal gross earnings of $120. The fine is $42. After normal deductions, take home pay would have been $100, but this was reduced to $58 because of the fine. Additional gross overtime pay is $168, which, after normal deductions, would be reduced to $138. If the fine is 80 percent of overtime earnings of $168, it is $134. When this amount is deducted from the $138 take home pay, the actual take home pay from the overtime work is $4, which, when added to the $58 take home pay from normal work, results in $62 total take home pay. Since the amount of time worked overtime was 28 hours, it is evident that the 80 percent fine on overtime is substantially a total deterrence to the strikebreaker working more than the normal hours that he would have worked but for the strike. For reasons previously stated, we believe that the foregoing degree of deterrence regarding

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[36] The prevalence of moonlighting (holding two jobs) and the general interest of most employees in overtime work at premium pay is indicative of the fact that in our consumer oriented society, particularly in periods of a rising standard of living and inflation and the desire for luxuries that are often regarded as necessities, the amount of take home pay is a, or the, major desideration.

overtime not normally performed by the strikebreaker is consistent with the concept of a reasonable line.

While the guidelines or formula that we have used as a standard for determining what is a reasonable fine under Allis-Chalmers are not meant to be inflexible with regard to particular factual situations that may arise, we believe that the formula is sound. The guidelines are in terms of maximums, beyond which the fine, in our opinion, would enter the area of an unreasonable or excessive fine. The maximum limit of a fine can, of course, have a tendency to become the normal fine but not necessarily, since, in particular situations, the specific circumstances or the objective may indicate the appropriateness of a lesser fine. In any event, we believe, that the maximums are sound norms and that deviation therefrom will tip, or begin to tip, a rather careful balance that must enter into the standard of a reasonable fine.

We therefore use, in the instant case, the standard that a fine imposed on a member by a union that is the authorized bargaining representative, and pursuant to due internal process, because the member has worked during the strike in violation of a union rule, is, presumptively, not a reasonable fine enforceable in court if the fine is: more than 35 percent of the members' earnings during the strike, if the member, in gaining such [35] earnings, was working the same number of hours at his normal wage rate as before the strike; or, more than 80 percent of the member's earnings during the strike if the member, in gaining such earnings, was working overtime hours at premium pay, which he would not normally have done and which would not have been available to him, but for the strike.

It is also our opinion that prior to, or in the course of, strikebreaking activity by union members, the union should issue a warning to the strikebreakers not only about the possibility or the reality of a fine but should also indicate the amount or potential amount of the fine or the method of computing the fine and the possibility of court enforcement thereof. The requirement of a warning, in our opinion, is consistent with the deterrent characteristic of the union's power to impose and collect a fine, whereas, in the absence of a warning, the fine takes on more of the coloration of a reprisal. Moreover, it would appear to be more in the

union's interest to deter strikebreaking from either commencing or continuing rather than to punish after the strike. And it certainly is in the employee's interest to be reasonably apprised and warned of the definite likelihood of a fine, its potential amount, and its enforceability, if he engages in, or continues, strikebreaking activity during a particular strike.

In Allis-Chalmers, although the Court did not stress this element, the fact was that the strikebreakers had been warned during the strike that they would be, or might be, fined, and the possible extent of and the size of the fine was indicated. It is not enough that the union constitution provides that various types of conduct by members, including working during an authorized strike, are subject to or shall warrant "reprimand, fine, and/or expulsion . . . ." The member cannot know from this that his working during a particular strike will result in punishment (albeit it warrants punishment), or what kind of punishment, or, if there should be a punishment and if it should be a fine, he has no idea whether it might be $20, $500 or what elements would enter into the determination of the amount of the fine. He does not know whether the Union would resort to court proceedings to collect any fine. Moreover, in the instant case, the Union had never previously imposed a fine on any of its members.

It has been held that:

> Among the most important of labor standards imposed by the Act . . . is that of fair dealing, which is demanded of unions in their dealings with employees. (citation omitted). The requirement of fair dealing . . . is in a sense fiduciary in nature and arises out of two factors. One is the degree of dependence of the individual employee on the union organization; the other, a corollary of the first, is the comprehensive power in the Union with respect to the individual. (*IUE, Frigidaire Local 801 (General Motors Corp.) v. N.L.R.B.* 307 F.2d 679 (C.A.D.C.)), cert denied, 371 U.S. 936.

Another court has stated:

> At the minimum, this duty requires that the Union inform the employee of his obligations . . . (*N.L.R.B.*

v. Hotel, Motel and Club Employees Union, Local 568 AFL-CIO (*Philadelphia Sheraton Corp.*), 320 F.2d 254 (C.A. 3).

[26] This comprehensive power of the Union over the individual employee, mentioned in the first cited case, would certainly be an apt characterization of the situation herein, where the Union has imposed substantial fines on individuals and court enforcement thereof.

Both the Board and the Courts have held that, although a valid union security contract is found to exist whereby union membership and the payment of dues is required as a condition of employment, a union cannot cause the discharge of an employee under the contract unless the employee had been informed of his obligation and the consequences that would follow from failure to fulfill his obligation. As the Court of Appeals, Second Circuit, phrased it, ". . . the Board has fleshed out the statute by requiring the the Union to give reasonable notice to an employee that he will lose his job for non-payment of dues." [37]

Since the existence of the contract in the cited cases set forth the requirement for the payment of union dues as a condition of employment, it, like the union constitution in the instant case, with its description of improper conduct by members and the possible consequences, could be said to have generally informed individuals of their obligation. But this was not enough. Where an individual did not know of or was uncertain about his obligation or the amount, the Union could not simply cause his discharge for failure to abide by the contract terms. Yet the contract was more precise than the instant constitution in defining the obligation and the consequence. Under the contract the individual was required to pay dues if he wished to continue as an employee. The constitution set forth *inter alia*, an obligation not to work but the consequences for violation were described in terms of a variety of potentialities which included, among others, reprimand, fine, and/or, expulsion. Neither in the constitution nor by other means were members pre-warned that, for working during the strike at

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[37] *N.L.R.B.* v. *Local 182, Teamsters*, —F.2d—, 69 LRRM 2388. See also cases cited above.

Michoud, they would be fined and, a fortiori, there was no indication given of the amount of, or the factors in, the fine. The fines and their amount did not make an appearance until after the strike.

In the court cases cited above, the action against the employees was the causing or attempting to cause their discharge for non-payment of dues under the contract. Since the Union had not informed them of their obligation, including the amount, beforehand, it could not legally attempt to cause, or cause, the discharge of such employees under the terms of the union shop contract. By the same token, in the instant case, the action against the employees was the imposition of fines in the amount of $450. There was no warning beforehand that fines would be imposed or the amount. As previously indicated, perhaps some employee members, who worked during the strike, would not have done so if warned beforehand, or they might have desisted, if they had already commenced work, upon being warned that they would be fined and the approximate amount of the fine.

Accordingly, we include as a constituent element of a reasonable fine, not only the standards and formula as to the amount of the fine, previously described, but the necessity of advising members, with regard to the particular strike, that such a fine will be imposed on those who [27] work or continue to work during the strike. Since we also believe that the approximate amount of the fine should be indicated, this aspect would be taken care of, if the standards or formula, aforedescribed, to be used in determining the amount of the fine, are mentioned. Believing, as we do, that a fine arrived at by the use of the standards or formula will be, presumptively a reasonable fine, the use of the formula should insure that the employees have not been threatened with an excessive or unreasonable fine and that the fine itself when eventually computed will not be unreasonable. We also believe that the possibility of court enforcement of the fine, if contemplated, should be stated, so that employees may completely understand the full import of their obligations under the union rules and the consequences that a violation may entail.

Applying therefore, the above standards, including the 35-80 percent formula for computing what is a reasonable fine, we now consider the fines of $450 in the instant case

that were imposed on all strikebreakers.[38] Consistent with our view, above, that a reasonable fine entails an antecedent warning that fines will be imposed for working during the particular strike, we find the $450 fines unreasonable since all action regarding fines occurred after the instant strike. As to the amount of the fines, we regard that as simply a matter of applying the 35-80 formula to the earnings of each strikebreaker. There were approximately 145 strikebreakers. From the payroll information in the record the Examiner is unable to make a precise determination of what would be a reasonable fine in amount as to each individual but this can be done at the compliance stage.[39]

However, as a rough illustration, we have taken, at random, two names of strikebreakers, Aragon and Bailey from the payroll records at hand. On a comparative basis, Aragon has a relatively low hourly rate, $2.50, in round numbers. Bailey has one of the highest hourly rates, $3.63. During the strike, Aragon worked 65 regular hours and the figures 8 and 4, for overtime and bonus, respectively, are shown. As indicated, we are uncertain as to the distinction between overtime and bonus or whether time and one-half or double time are paid under one but not the other or both. In any event, for illustration, we will assume a total of 12 premium hours which were paid at double time rate or $60 for Aragon. His 65 regular hours, we assume, were paid at his regular rate which would mean $162. His total earnings therefore were $222. The 35-80 formula, if applied, would mean a fine of $57 on his $162 regular earnings and a fine of $48 on premium earnings or a total fine of $105. Adopting the same approach as to Bailey, we have 75 regular hours and a total of 22 under overtime and bonus. Bailey's regular earnings would be $272 and his premium hours at double time would be $159 or total earnings of

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[38] To the Examiner, the utility and the equity of employing a standard or formula to determine whether or not a fine is reasonable is now rather concretely evident. Absent such an approach what workable basis is there for reaching a conclusion about the reasonableness of a $450 fine in the instant case. What is reasonable—$20; $50; $500; $125; $200; $350; $400; $450, or some other figure, and why is one amount reasonable and another unreasonable.

[39] For instance, payroll records show regular hours worked, overtime hours and a figure under "bonus" which may indicate bonus hours. We are uncertain about the computation of overtime and bonus. Total dollar earnings under regular, overtime, and bonus are not shown.

$431. Applying the 35-80 formula, the fine on regular earnings would be $95 and the fine on premium earnings would be $128 or a total fine of [28] $223. Since other strikebreakers had different hourly rates and worked varying amounts of regular work and different or no overtime and bonus work, a varied picture will eventually appear. The indication is, however, from the admittedly imprecise data which we used in our two illustrations, that the fine of $450 on all strikebreakers was not a reasonable fine in amount in most, and possibly all, cases. But this, as indicated, can be determined precisely at the compliance stage. The $450 fine of any strikebreaker, in our opinion, which exceeds the amount of a fine under the 35-80 formula when applied to the individual's earnings, is not a reasonable fine.

The complaint alleges that the fines "in the sum of $450 each" are "unreasonable, excessive, and discriminatory." The sole reference, in the complaint, to any fine other than the $450 fines is with respect to employees who had resigned from the Union. As to that category, the complaint alleges that the fines "in the sum of $450 each or lesser amounts" are "unreasonable, excessive, and discriminatory."

The General Counsel's brief is consistent with the foregoing allegations but the brief also reveals why the General Counsel believes that the $450 fines as to everyone involved are "discriminatory" in addition to being unreasonable and excessive. It is argued that, since, in some instances, the Union reduced the $450 fines to 50 percent of earnings by the strikebreaker at Boeing during the strike, but did not do so in all instances, this was discriminatory. Thus, "This action in denying the same right to the discriminatees as afforded other employees, even though they did not appear at their union trials, is clearly discriminatory." From this, and from the allegations in the complaint, above, it can be said that, except as to employees who had resigned, fines less than $450 are not attacked by the General Counsel. Fines less than $450 are otherwise referred to only in support of the argument that the $450 fines were discriminatory, in addition to being unreasonable and excessive.

In the etymological sense the 50 percent of earnings as distinguished from $450 is discriminatory since there is a distinction or difference in treatment and amount. But,

in our opinion, in itself, it is not an illegal discrimination for a union to treat differently those members who appear at their trial, repent, and pledge future loyalty, as distinguished from members who never appeared or never made a plea. All members were duly notified of their trials and all could have appeared and all would evidently have received the same treatment under similar conditions. We therefore, do not find that the $450 fines were discriminatory.

For reasons previously stated at length, it is found that the fines of $450 that were imposed after the strike, without prior specific warning that they would be imposed at Michoud, and in amounts that exceeded the 35-80 standard or formula in relation to earnings, were unreasonable fines and that, under all the circumstances in this case, including court enforcement of the fines, there was a violation of Section 8(b)(1)(A) of the Act. It is our opinion that the violation was compounded in those cases of members who had resigned from the union prior to the imposition of fines. It is our opinion that resignations received by District Lodge 751 constituted valid resignations in view of the circumstances described earlier in this decision. In any event, Lodge 405 [29] was aware of the resignations before taking action regarding fines.[40] Moreover, since the Union took the position that a member could not resign from the Union, the resignations and the details thereof, including receipt, were futile gestures insofar as the Union was concerned, but, in our opinion, effective notwithstanding, since the intent of the resignees is clear.[41]

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[40] In some instances, the resignations were received prior to the time the employee went to work during the strike. In more instances, the resignations were deposited in the mail before the employee returned to work. All or practically all resignations were received by the Union prior to any action on the subject of fines.

[41] *Aeronautical District Lodge 751, International Association of Machinists & Aerospace Workers, AFL-CIO (The Boeing Company)*, 173 NLRB No. 71, 61 LRRM 1363.

At the conclusion of the body of his decision in the instant case, the Examiner finds, although it may be of no moment to anyone but himself, that his effort to apply and to implement the Allis-Chambers decision and its rationale in the present case, confirms him in his respectful disagreement with the Allis-Chalmers decision regarding the meaning of Section 8(b)(1)(A) and its proviso. In our opinion, the above section of the Act reveals a congressional intent that union fines and their amount were to be a matter for the Union, including

Conclusions of Law

As set forth hereinabove and for the reasons hereinabove stated, it is found that, by threatening to seek, or by seeking, court enforcement of unreasonable fines imposed upon employees, who were union members, or by imposing fines or by seeking court enforcement of fines upon employees, who were former union members who had resigned from the Union, all because said employees worked during the September, 1965, strike at Boeing's Michoud plant, the Respondent Union restrained and coerced said employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

[30] *The Remedy*

Having found that Respondent has engaged in certain unfair labor practices, hereinabove described, it will be recommended that Respondent cease and desist from such conduct.

It will also be recommended that, with respect to any employee who had resigned from membership in the Union, who had formerly been a union member, and who was fined after his resignation, and who paid any such fines to Respondent, Respondent refund or reimburse said employee the amount of such paid fine. As to employees who had

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the enforcement of such internal disciplinary measures by internal means. The maximum internal sanctions preserved to the union for enforcement of its disciplinary measures, such as fines, were, we believe, denial of membership or expulsion. The rights and restrictions in the Act are applicable to all unions, the weak and the strong, the effective and the ineffective. If, for instance, one union because of its economic strength and bargaining power, in the exercise of the rights under Section 8(a)(5) of the Act, is able to secure a contract from an employer with substantial wage increases and other benefits, but, another union, lacking effective economic bargaining power, can secure no appreciable benefits in a contract with an employer, these differences do not alter the meaning or the limitations of Section 8(a)(5). Expulsion from membership or the threat thereof may be an effective disciplinary tool in some organizations and not in others, or it may be more effective in one organization than in another and may vary in different situations. In our opinion, these factors do not alter the meaning of Section 8(b)(1)(A) and its proviso as we read and understand them and their legislative history. But Allis-Chalmers is the law on the subject and it is that decision that has governed the instant decision and has involved us in the matter of what is a reasonable union fine for violation of a union rule.

remained union members, it will be recommended that any such employee, who paid an unreasonable fine after Respondent threatened to institute, or instituted, steps for the court enforcement of such unreasonable fines, be reimbursed or refunded by Respondent the said unreasonable fine. The determination of whether or not the fine was reasonable or unreasonable will be on an individuals basis since, as set forth in our decision above, the earnings and types of earnings, regular or premium earnings, of the employee member, are important elements in determining whether or not the fine was reasonable pursuant to the standards or formulate that we have adopted.

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, we recommend the following:

Recommended Order

Respondent, Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employee members of Respondent Union, in the exercise of their rights guaranteed in Section 7 of the Act, who worked at the Michoud plant during the September, 1965 strike, by threatening to seek, or by seeking, court enforcement of unreasonable fines imposed on said employee members.

(b) Restraining or coercing employees, who had resigned from the Respondent and who were no longer members of Respondent, in the exercise of their rights guaranteed in Section 7 of the Act, by imposing fines or by threatening to seek or by seeking court enforcement of fines when said fines were imposed because said employees had worked at the Michoud plant during the September, 1965, strike.

(c) In any like or related manner, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Reimburse or refund to any employees, described in paragraph 1(a) of this recommended order, above, who have paid unreasonable fines under the circumstances de-

scribed in paragraph 1(a), above, the amount of the unreasonable fine.

[3] (b) Reimburse or refund to any employees, described in paragraph 1(b) of this Recommended Order, above, who, if any have paid fines under the circumstances described in paragraph 1(b) above, the amount of said fine.

(c) Post at its office and meeting hall and at the Michoud, Louisiana plant of The Boeing Company, if the Company is willing, copies of the attached notice, marked "Appendix."[42] Copies of said notice, in forms provided by the Regional Director, Region 15, of the Board, after being signed by an authorized representative, shall be posted at the aforementioned locations, in conspicuous places at said locations, including all places where notices to employees are customarily posted, and reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by other material.

(d) Notify the aforesaid Regional Director, in writing within 20 days of receipt of the Decision, what steps it has taken to comply herewith.[43]

Dated at Washington, D.C. 12/30/68

/s/ Ramey Donovan
Trial Examiner

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[42] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words, "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the word "A DECISION AND ORDER."

[43] In the event that this Recommendation Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, with 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

FORM NLRB-4030 (7-65) **APPENDIX** TXD-737-68

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our employees that:

After a trial in which all parties, the union, the Boeing Company, and the General Counsel of the National Labor Relations Board were represented by attorneys, a Trial Examiner of the Board, who heard the evidence, has found that we have violated the National Labor Relations Act in certain respects, and, in his decision, his recommended order is that we post this notice and comply with what it states.

WE WILL NOT restrain or coerce employees, members of our union, in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, which rights include the right to engage in or to refrain from engaging in union activity, who worked at the Michoud plant during the September 1965, strike, by threatening to seek, or, by seeking, court enforcement of unreasonable fines imposed upon them by the Union.

WE WILL NOT restrain or coerce employees who had resigned from the Union and who, in the exercise of their rights guaranteed in Section 7 of the Act, worked at the Michoud plant during the September 1965 strike, by imposing fines or by threatening to seek or by seeking court enforcement of said fines as to such employees.

WE WILL reimburse nonmembers above mentioned for any fines they may have paid to us for working during the said strike.

WE WILL reimburse members for any unreasonable fines they may have paid to us for working during the

said strike after we threatened to seek or sought court enforcement of said unreasonable fines. The standard and methods for determining whether a fine as to a particular employee is or was reasonable are set forth in the Decision of the Trial Examiner and the determination takes into consideration the earnings of the individual employee at the Michoud plant during the 1965 strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed to them in Section 7 of the National Labor Relations Act.

Dated: .....

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

.....
(*Employer*)

By .....
(*Representative*) (*Title*)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 76024 Federal Building (Loyola) 701 Loyola Ave., New Orleans, La. 70113 (Area Code 504, Tel. No. 527-6369).

[Caption Omitted in Printing]

GENERAL COUNSEL'S EXCEPTIONS TO THE TRIAL EXAMINER'S DECISION

Counsel for the General Counsel of the National Labor Relations Board excepts to the Trial Examiner's Decision in the above case in the following particulars:

1.

The formulation of a 35 percent regular—80 percent overtime earnings test for determining the reasonableness of a fine (TXD p. 20, L. 38-46; p. 21, L. 9-17).

2.

The finding that a prior specific warning as to the imposition of the fines and their approximate amount is a constituent element of a reasonable fine (TXD p. 25, L. 6-21; p. 26, L. 49-52; p. 27, L. 1-4).

3.

The finding that any fine of a non-member after he has resigned will constitute a violation of Section 8(b)(1)(A), regardless of whether he was a member at the time of the conduct for which the fine was imposed (TXD p. 28, L. 52-54; p. 29, L. 1, 13-15, 22-26), and the corresponding language in the recommended remedy and order (TXD p. 30, L. 6-11, 37-40).

4.

The failure to find that the Union violated Section 8(b)(1)(A) as to members by the imposition of unreasonable fines without more (TXD p. 29, L. 10-13), and the corresponding language of the recommended remedy and order (TXD p. 30, L. 11-15, 33-37).

5.

To the extent that the recommended remedy and order is susceptible of such an interpretation, the failure to provide for reimbursement of members' fines in their entirety rather than only that part which may have exceeded a "rea-

sonable" fine under the formula devised (TXD p. 30, L. 11-20, 53-56).

Respectfully submitted

/s/ Thomas D. Johnston
THOMAS D. JOHNSTON
Counsel for General Counsel

February 27, 1969

[Caption Omitted in Printing]

EXCEPTIONS TO THE TRIAL EXAMINER'S DECISION

Comes now The Boeing Company, the Charging Party in the above-captioned matter, and these, its exceptions to the Trial Examiner's Decision, issued by Trial Examiner Ramey Donovan on December 30, 1968, and other rulings in connection with the aforesaid proceedings.

1.

To the Trial Examiner's statement, at D.3, line 11 (beginning with the word "At")—D.3, line 12, as being unsupported by if not contrary to the record, in that employees other than those who were members of the Union crossed the picket line and worked.

2.

To the Trial Examiner's use of the word "alleged," at D.3, line 13-15.

3.

To the Trial Examiner's failure to find, D.3, lines 21-23, or elsewhere, that the Union had never before fined or threatened to fine the unit employees for any reason, the said failure to so find being contrary to the uncontradicted evidence in the record.

4.

To the Trial Examiner's statement, D.3, lines 50-55, to the effect that the internal due process of the steps taken

by the Union is not in issue, as being contrary to the record, in that the Charging Party and the evidence itself raised the issue.

5.

To the Trial Examiner's failure to find, D.3, lines 50-55, or elsewhere, that the members and ex-members were not accorded a fair hearing or trial or other due process, in that, *inter alia,* they were not given adequate or otherwise proper notice as to the fines or other penalties which might be levied against them, and that they were, for all practical purposes, deprived of representation by counsel. See General Counsel's Exhibit No. 5, page 112; General Counsel's Exhibit No. 10; Tr. 20, line 18—Tr. 30, line 5; Tr. 31, line 18—Tr. 33, line 12. (See also p. 4, lines 1-8).

6.

To the Trial Examiner's failure to find, D. 5, lines 9-10, that Boeing undertook to defend the suits against *some* individual employees.

7.

To the Trial Examiner's statement or finding, D. 7, lines 29-30, as being unsupported by and contrary to the record and the law.

8.

To the Trial Examiner's failure to find, D. 9, or elsewhere, that the fines levied herein were arbitrary, capricious and discriminatory, and therefore they were levied in violation of Section 8(b)(1) of the Act.

9.

To the Trial Examiner's failure to find, D. 9, lines 25-38, that such fines must not be arbitrary, capricious or discriminatory.

10.

To the failure of the Trial Examiner, D. 13, lines 1-5 and elsewhere, to properly compare the fines with dues and other fees.

11.

To the Trial Examiner's findings, D. 14, lines 25-26, and elsewhere to the effect that normal earnings during the strike is a factor to be considered in assessing fines.

12.

To the Trial Examiner's failure to find, D. 14, lines 24-26, D. 15 lines 1-13, and elsewhere that individual fines are immaterial in assessing the amounts of fines or the reasonableness or other legalness thereof.

13.

To the Trial Examiner's findings, D. 16, line 32—D. 17, line 33 as being contrary to the law.

14.

To the Trial Examiner's statements or findings, D. 18, lines 54-57, as being contrary to the law.

15.

To the Trial Examiner's statements or findings, D. 19, lines 2-12 as being contrary to the law and precedent.

16.

To the Trial Examiner's findings, D. 19, lines 14-28, as being contrary to the law and precedent.

17.

To the Trial Examiner's findings, D. 20, lines 32-46, as being contrary to the Act and the law.

18.

To the Trial Examiner's findings, D. 20, line 48- D. 21, line 40, as being contrary to the facts and the law.

19.

To the Trial Examiner's findings, D. 22, lines 7-27, as being contrary to the record and the law.

20.

To the Trial Examiner's findings, D. 22, lines 29-41, as being contrary to the record and the law.

21.

To the Trial Examiner's findings, D. 23, lines 5-39, as being contrary to the law.

22.

To the Trial Examiner's findings, D. 24, lines 8-30, as being contrary to the law.

23.

To the Trial Examiner's findings, D. 24, line 45-D. 25, line 5, as being contrary to the law.

24.

To the Trial Examiner's findings, D. 28, lines 37-55, as being contrary to the law.

25.

To the Trial Examiner's findings and statements, D. 29, lines 30-55, as being contrary to the law.

26.

To the Trial Examiner's failure to find, D. 29, lines 30-55, that the Supreme Court was in error in *N.L.R.B.* v. *Allis-Chalmers Manufacturing Company,* 388 U.S. 194 (1967), and that the decision is erroneous and contrary to law.

27.

To the failure of the Trial Examiner, at D. 20-31, to order the Union to withdraw its pending law suits.

28.

To the Trial Examiner's failure to include in the Notice To All Employees, provisions to the effect that the Union will withdraw its law suits and that it will not impose

fines upon employees for exercising their rights under Section 7 of the Act.

29.

To the Trial Examiner's failure, D. 30, lines 11-20, or elsewhere, to order Respondent to refund to all employees for the total amounts of fines paid by them.

30.

To the Trial Examiner's development of a "formula" in connection with the fines, the said formula being unnecessary in the instant case.

31.

To the Trial Examiner's failure, D. 30-31 or elsewhere, to order that interest be computed on the refunded fines in the same manner as ordered by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

32.

To the Trial Examiner's statements and findings, D. 15, lines 15-18 and lines 30-35, as being contrary to the record and to the law.

Respectfully submitted this 26 day of February, 1969.

Kullman, Lang, Keenan, Inman & Bee
1010 Whitney Bank Building
New Orleans, Louisiana 70113
Telephone: 524-4162

/s/ C. Dale Stout
C. Dale Stout
Counsel for the Boeing Company

[Certificate of Service Omitted in Printing]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Fifteenth Region

In the Matter of: BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO RESPONDENT AND THE BOEING COMPANY CHARGING PARTY	Case No. 15-CB-779

Room T-6009
Federal Building
701 Loyola Avenue
New Orleans, Louisiana
Wednesday, October 2, 1968

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

BEFORE:
RAMEY DONOVAN, *Trial Examiner*

APPEARANCES:

THOMAS JOHNSTON	National Labor Relations Board, Room T-6084, Federal Building, New Orleans, Louisiana, appearing as Counsel for General Counsel
C. PAUL BARKER	(Dodd, Hirsch, Barker & Meunier) 711 Carondelar, New Orleans, Louisiana, appearing on behalf of the Respondent.
C. DALE STOUT	(Kullman & Lang) 1010 Whitney Building, New Orleans, Louisiana, appearing on behalf of the Charging Party.)

* * *

[6]. DAVID H. MERIWETHER

was called as a witness by and on behalf of General Counsel and, having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

* * *

THE WITNESS: David H. Meriwether, 3601 North Lemans, New Orleans.

* * *

Q. Mr. Meriwether, were you employed by the Boeing Company at the time—the Michoud Plant, at the time of the strike in September, 1965?

A. Yes.

Q. Approximately how long had you been working there, at the time?

A. Work at Michoud?

Q. Yes, at the Michoud Plant at the time the strike occurred?

A. Approximately a year and a half.

Q. At that time, were you a member of the Boosters Lodge?

A. Yes.

Q. And when did you join?

A. 1961.

Q. You had worked for the Boeing Company before?

A. Yes, sir.

Q. Where was that?

A. That was in Rapids City, South Dakota.

Q. Did you have a break in your employment?

A. Yes.

Q. At the time you came to work down here, did you—What steps did you take to become a member of the union?

A. I didn't take any steps.

Q. Would you tell us what happened?

A. I was told when I came down here, to fill out a form indicating that I did not want to join the union. At [8] that time, I didn't think I belonged. I filled out the form, and approximately eight months later, I already belonged. At that time, they just started taking dues out.

Q. Now, when the strike occurred, did you make any attempts to resign from the union?

A. Yes, sir.

Q. What did—What steps did you take?

A. I believe the strike was called on the 15th of September. I filled out three letters on the 16th and sent one to the Local, I think, IAW, I sent one to the head of the Union in Seattle. I sent one to the company, all registered. I stayed off work until I received a receipt back that they had received my letter.

Q. How did you send these letters that you sent?

A. Registered mail.

Q. Did you get return—request return receipts?

A. Yes, sir.

Q. Did you receive those back?

A. Yes, sir.

Q. The letters that you sent, were they identical, or do you recall?

A. They were similar.

Q. Similar?

A. Yes.

Q. Mr. Meriwether, I show you four documents marked for identification as General Counsel's Exhibit No. 2 and ask you [9] if that is the letter you sent to the company? (presenting document.)

A. (no response)

Q. With attached envelope?

A. It is.

Q. I show you some documents that have been marked for identification as General Counsel's Exhibits 2-a, 2-b and 2-c, and ask you if those are the registered return receipts you described?

A. They are.

MR. JOHNSTON: At this time, we offer——

MR. BARKER: Specify what organizations the return receipts are from.

MR. JOHNSTON: It has it on here, on the return receipt.

MR. BARKER: I think it will be helpful for the record. With your permission I will indicate; 2-a indicates a signature, International Association of Machinists, 9-21-'65, New Orleans, Louisiana; 2-b the Boeing Company, 9-21-'65; and 2-c Aero Machinists, 751, it doesn't show the place, can we agree Seattle?

MR. JOHNSTON: The receipt is dated September 22, Seattle.

MR. BARKER: September 22, Seattle.

MR. JOHNSTON: At this time, I offer them.

[10] TRIAL EXAMINER: Hearing no objection they are received.

(The above referred to documents, General Counsel's Exhibits Nos. 2, 2-a, 2-b and 2-c were marked for identification and received in evidence).

Q. (By Mr. Johnston) I think you stated, Mr. Meriwether, to clarify the record, after you—What time did you go to work in relation to the time you mailed these letters?

A. After the receipt of the receipt.

Q. Do you remember the specific date you went to work?

A. No, sir.

TRIAL EXAMINER: The strike commenced on the 15th, did you say?

MR. JOHNSTON: I think we could stipulate, your Honor, it started on the 16th—the morning of the 16th—the old contract expired at midnight on the 15th of September, 1965. The strike started September 16.

MR. BARKER: Stipulate how long it lasted?

MR. JOHNSTON: The allegation was admitted in the complaint as up to October 4.

MR. BARKER: We propose a stipulation that the old contract expired on September 15, 1965, that the strike and picketing began on the morning of September 16, 1965, that, thereafter, the picketing continued through October 2, it was resolved during the day of October 3, 1965, and the [11] strike terminated October 4, 1965.

We amend our stipulation to propose that after a ratification meeting of October third, the picket line was pulled down midnight of October third, and the contract was retroactive to October second.

MR. JOHNSTON: We will stipulate to that.

MR. STOUT: I will so stipulate.

TRIAL EXAMINER: All right. The stipulation is received.

Q. (By Mr. Johnston) After you sent these letters to the union notifying them you resigned, did you receive any communication from the union about whether or not your resignation had been accepted?

A. No.

Q. Was there, to your knowledge, any action taken

against you by the union for having worked during the strike?

A. Yes, sir.

Q. Would you state what that was and what notification you received?

A. I received a letter that I was fined and to appear before, what I think, is a Kangaroo Court.

Q. Well, I will strike that reference.

You received a letter that you had been fined, or to appear before a court?

A. Yes, sir. Right.

[12] Q. Did you later receive notification as to the amount of the fine?

A. Yes, but I don't recall what it was.

Q. Did you ever pay the fine?

A. No.

Q. Did you ever receive any notification that any legal action would be taken against you?

A. Yes.

Q. As of this date, has any legal action been taken against you, other than the fine?

A. No legal action.

* * *

Q. (By Mr. Johnston) Mr. Meriwether, do you recall when the hurricane struck in New Orleans?

A. (no response)

Q. Prior to the strike.

A. The exact date, no. I believe it struck approximately one week before the strike.

Q. As a result of the hurricane, did you miss any time from work?

[13] A. Approximately one week, I believe.

Q. Why did you miss this time from work?

A. I couldn't get to the plant.

Q. And why was that?

A. Flooded conditions.

Q. Do you recall what hurricane that was?

Mr. Barker: I object on the grounds of its being irrelevant and immaterial.

I assume it is not intended that the union had anything to do at all with the hurricane.

Mr. Johnston: I will stipulate to that, Mr. Barker, but

we have an issue, here: Whether or not these fines levied against these individuals were unreasonable, or excessive.

TRIAL EXAMINER: Because he lost a week?

MR. JOHNSTON: Yes, sir. We are trying to show—One of the many reasons we will advance why the fines were unreasonable or excessive. They should be considered in determining whether or not the fines were unreasonable—Here the employees, shortly after a hurricane had affected their employment, they were fined for going back to work.

We think it would be relevant and material to the issues.

TRIAL EXAMINER: Without necessarily agreeing or disagreeing with your particular conclusion, I think you are [14] entitled to lay the foundation, to make the argument, so I will allow it.

MR. BARKER: I respectfully suggest that whether there has been a hurricane, or not, whether a man's wife has died, or not, whether he has a large family or is behind in the payments of his car, all of these economic factors are totally and completely irrelevant. Otherwise, we would try each individual person as to the affect of the amount of the fine on his personal finances so that the Trial Examiner and the Board, and the courts would be required to examine whether a millionaire could stand a four hundred fifty dollar fine and whether a poor laborer with fourteen children could not sustain a two dollar fine.

This is particularly irrelevant to these proceedings, the economic status of every individual.

We don't want to be put in that position.

* * *

[15] MR. JOHNSTON: I might, just to clarify the record, say, your Honor, that we would not go into each individual's economic situation. We contend here that the hurricane is something that affect practically everyone in the City of New Orleans and, certainly, Michoud, the Michoud Plant. It would have a direct bearing on all economies.

TRIAL EXAMINER: I don't know as I agree with your contention or not, but I think you are entitled to lay the foundation to make the argument.

[16] CROSS EXAMINATION

* * *

[18] Q. And by whom were you notified that you were a member of the union?

A. Boeing Personnel.

Q. Boeing Personnel told you?

A. (no response)

Q. And thereafter, sometime in 1964, they began deducting dues from your wages?

A. Right.

[19] Q. All right. Where do you live, Mr. Meriwether—excuse me—Where were you living at the time of the hurricane?

A. Chalmette.

Q. Chalmette, Louisiana?

A. Right.

Q. Was there any particular reason why you were unable to go to work during the hurricane?

A. Yes. The entire town of Chalmette was blocked off by the National Guard, it was impossible, due to high water.

Q. Now, how many days were you off?

A. I can't answer that. I don't remember.

Q. I see. Were you able to communicate with the plant?

A. No.

Q. By telephone or otherwise?

A. No.

Q. Were you able to send any messages to the plant?

A. No.

Q. Now, at the time that the hurricane struck in September, 1965, you had been employed at this plant for well over a year, had you not?

A. Yes.

Q. Did you have vacation and leave benefits accrued?

A. I imagine, yes.

Q. Did you take any of those vacation or leave benefits, or were you allowed to take them as a result of being out [20] during the hurricane?

A. Probably was allowed, but I don't remember taking them.

Q. Do you remember that you went in and got paid for the time you lost during the hurricane?

A. No.

• • •

[21] Q. You knew the termination date of the contract, did you not?

A. Yes.

Q. Did you know there had been negotiations?

A. Yes.

Q. This contract applies to all of Boeing's Aerospace work, not only here but in Seattle and in other places.

A. Yes.

Q. It doesn't just apply to the New Orleans Plant.

A. Right.

Q. Were you notified of a meeting to be held to vote on whether to accept the contract or to strike?

A. It was posted, yes.

Q. It was posted and you knew of the meeting?

A. Yes.

Q. Where was the meeting held?

A. At that time, it was some place on Chef Highway.

Q. All right.

A. New Orleans.

Q. And, did you attend the meeting?

A. No.

Q. You knew that you had a right to attend the meeting and vote as to whether to accept or reject the contract?

A. Right.

[22] Q. Did you attempt to go to work the morning the strike started?

A. No.

Q. Were you scheduled to work that morning?

A. Yes.

[23] Q. And why was it that you did not attempt to go to work?

A. I felt that I was still a member of the union.

Q. I see. Now, did you attempt to go to work before you wrote the letter?

A. No.

Q. What was your reason for writing the letter?

A. To terminate my membership in the union.

Q. And did you desire to terminate your membership in the union so that you could go through the picket line and go to work?

A. No.

Q. What was—How soon after you wrote the letter did you go to work?

A. When I received my receipt that the union had received my notification.

Q. Then you went to work?

A. Then I went to work.

Q. Well, I will ask you again. Was it the purpose of the letter and your resignation in the union so that you could go back to work through the picket line?

A. No.

Q. What was that purpose, the purpose of the letter?

A. To discontinue my membership and affiliation with the union.

• • •

[25] Q. Is it your testimony that the strike only lasted two days after you went to work?

A. No, it lasted, I would say, one working week.

Q. One working week? All right. You worked all during this time?

A. Yes.

Q. All right, now, had you ever attempted to obtain the constitution of the International Association of Machinists?

A. The constitution?

Q. Yes.

A. You mean a copy of it, or what?

Q. Yes. Have you ever gotten one of those?

A. No.

Q. Did you ever ask for one?

A. No.

Q. All right. You knew at the time that you went to work that there was no contract in effect between the Boeing Company and the union?

A. Yes.

Q. Did you participate in the vote to accept or ratify [26] the contract on October third, 1965?

A. No.

Q. Now, do you have a copy of that letter that the union sent you notifying you that you would be charged?

A. Yes.

Q. Brought to trial?

A. Yes.

• • •

Q. (By Mr. Barker) Mr. Meriwether, were you notified by the union that charges had been brought against you and that under the provisions of the constitution, you would be brought to trial by the local union?

A. Yes, sir.

Q. Do you recall the date that you were to be tried?

A. No.

Q. If I suggested to you Wednesday, November 10, 1965, 12:30 p.m., would that refresh your recollection?

A. No.

Q. All right. But you were given a specific time and date for your trial?

A. It was stated in the letter, yes.

• • •

[27] Q. (By Mr. Barker) After the date had passed for your trial, by the way, you didn't show up at your trial?

A. No, sir.

Q. After the date had passed, were you notified that you had been fined?

A. Yes, sir.

Q. That you had been denied the holding of office for a period of five years?

A. Yes, sir.

Q. All right. Were you invited to make arrangements, or were you advised that you could appeal this decision to the International president?

A. Yes.

Q. You never contacted the local union to make any arrangements to have the fine reduced or to appeal the fine or to pay the fine?

A. I had made no arrangements, no.

Q. No arrangements, whatsoever, never contacted the local union?

A. Never contacted the local union, no.

REDIRECT EXAMINATION

Q. (By MR. JOHNSTON) You stated earlier that you couldn't [29] recall the amount of the fine. Do you recall, now, what the amount was?

MR. BARKER: We will stipulate the fine was $450.00.

* * *

Q. (By Mr. Stout) You said you received notification of time and date of the trial, in connection with a charge against you. Do you recall whether it was stated what the charge was?

A. What the charge was?

Q. The charge against you, yes, sir.

MR. BARKER: We will stipulate that the charge will be—in his letter—will be identical with the charges in a general letter that will be offered as an exhibit by the Government.

Q. (By Mr. Stout) You testified that you did not appear at this trial. Will you tell us why you didn't show up?

MR. BARKER: We think it is irrelevant and immaterial. We object.

TRIAL EXAMINER: Oh, I can see some possible relevance. Go ahead.

A. I believe, in the letter, it stated that if I appeared before this trial, that the lawyer I would be represented by [30] would be a union lawyer, only.

Q. Union lawyer only? Is that what you said?

A. Right. If I could have brought my own Counsel, I would have attended this trial.

* * *

TRIAL EXAMINER: When you commenced working during the strike, did any representative of the union say anything to you?

THE WITNESS: No.

TRIAL EXAMINER: No one warned you that you were subject to discipline or fine, or anything else?

THE WITNESS: No.

* * *

[31] RECROSS EXAMINATION

Q. (By Mr. Barker) Just to clarify the record, your letter that you received notifying you of the trial, stated to you, at the time, the charges will be read to you and you have the right to an attorney, the attorney being a member of the IAMAN to defend you. Is that what the letter said to you?

A. Yes, sir.

Q. Are you familiar with the provision in the constitution [32] which provides that both the plaintiff and the defendent shall have the privilege of presenting evidence and be represented, either in person, or by an attorney, the attorney being a member of the IMAW? Did you know that was a provision of the constitution of the International?

A. No.

Q. Did you make any effort to bring an attorney with you, assuming he was not a member of the IAM or to request permission to be represented by an attorney at the trial?

A. No. It stated I would only be covered by the union representative. I made no further attempt to question them.

Q. It didn't say union representative, it said an attorney, a member of the IAM.

A. Is that what it said?

MR. BARKER: Speak out so the reporter can get it.

A. I don't have the letter. If you say it says that, I guess it did.

Q. Do you—Suppose I show you a copy of the letter to refresh your recollection.

I will show you the original addressed to you (presenting document) and ask you if you would read that paragraph about an attorney.

A. I will read the last sentence or paragraph.

> "You are hereby notified that this trial will be held Wednesday, November 10, 1965, 12:30 p.m. in the union hall, 1344 Chef Menteur Highway. At this time, charges will be read to you and you have the right to have an attorney." Then, in parenthesis, "the attorney being a member of the IAMAW, to defend you. Under the constitution, if you fail to appear for the trial

when notified, the trial will proceed as though, in fact, the member were present."

REDIRECT EXAMINATION

Q. (By Mr. Stout) Do you know any attorneys who are members of the IAM?

A. No.

* * *

ROBERT E. GROAT

[34] was called as a witness by and on behalf of General Counsel and, having been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

* * *

Q. Your address?

A. Mailing address, post office box 1002, Slidell, Louisiana.

Q. Mr. Groat, were you employed by the Boeing Company at the Michoud Plant at the time that the strike occurred in September, 1965?

A. I was.

Q. Approximately how long had you worked for the company at that time?

A. I was hired in, September 15, 1948.

Q. Where did you first go to work for the company?

A. Wichita, Kansas.

Q. You transferred down here, from there?

A. I did not. I quit and came down on my own, hired back in, down here.

Q. Were you a member of the Boosters Lodge 405?

A. At Wichita?

Q. No, here.

[35] A. Here, yes.

Q. At the Michoud Plant.

Did you make any efforts at the time of the strike, to resign from the union?

A. To resign?

Q. From the union.

A. Just sent in a letter, was all.

Q. Who did you send the letter to?

A. One to Seattle, and one to the Labor Relations Board at Seattle.

Q. And the one you sent to Seattle was to the union?
A. To the union, yes.
Q. Which union was that?
A. 701, union 701.
Q. 751?
A. 751.
Q. How did you send that letter?
A. By registered mail.
Q. Did you keep a copy of the letter you sent to the union?
A. I did. On the letter—no, I don't have a copy.
Q. Do you recall what was in the letter?
A. Just wished to terminate from the union.
Q. Now, did you get a registered receipt for the letter that you sent to the union?
[36] A. No, I did not.
Q. I don't mean a registered return receipt, but did you keep a copy of the registration of the letter?
A. Yes, I did.
Q. I show you a document marked as General Counsel's Exhibit 3 and ask you if this is the letter that you sent to the company?
A. Yes, sir, it was.
Q. I show you another document marked for identification as General Counsel's Exhibit 3-A, a registered receipt—are these registered receipts for the letters you sent to the union and the company?
A. Yes, sir. They are.

MR. JOHNSTON: At this time, I would like to offer General Counsel's Exhibits 3 and 3-A into evidence, with permission to withdraw 3-A to make a photostatic copy.
TRIAL EXAMINER: If there is no objection, they are received.

* * *

Q. (By Mr. Johnston) Now, the letter that you sent to the union, did you receive any reply from that letter about your resignation?
A. No, I did not.
Q. During the strike?
[37] A. Not until after I sent the letters.
Q. Do you recall how long after you sent the letters you returned to work?

A. September 25 was when I went back to work, I think.

Q. Did you ever receive any notation from the union you had been fined for working during the strike?

A. I did.

Q. Do you recall the amount of the fine?

A. $450.00.

Q. Had you ever received any warning you would be fined for working during the strike?

A. No warning.

Q. Did you ever receive any notification that legal action would be taken against you if you didn't pay the fine?

A. Not until after I received this letter.

Q. Do you recall who it was from that you received it?

A. From the local union.

Q. Have you ever been notified that this fine has been rescinded?

A. No, I haven't.

* * *

CROSS EXAMINATION

* * *

[38] Q. Now, Mr. Groat, when you joined the International Association of Machinists, did you join Local 751 or Local 405?

A. I joined the union here.

Q. Local 405?

A. Local 405, yes, sir.

Q. In fact, Mr. Higgins signed you up in the local, didn't he?

A. I believe he did.

Q. Mr. Bud Higgins?

A. Yes, sir.

Q. You joined it voluntarily?

A. Yes, sir. I did.

Q. Do you remember when you joined it?

A. It wasn't too long after I went to work—the date definitely, no.

[39] Q. Did you know that around September 15, 1965 the contract between Boeing and the International Association was about to expire?

A. I did, sir.

Q. Were you notified that a meeting would be held on the 15th of September?

Q. And the one you sent to Seattle was to the union?
A. To the union, yes.
Q. Which union was that?
A. 701, union 701.
Q. 751?
A. 751.
Q. How did you send that letter?
A. By registered mail.
Q. Did you keep a copy of the letter you sent to the union?
A. I did. On the letter—no, I don't have a copy.
Q. Do you recall what was in the letter?
A. Just wished to terminate from the union.
Q. Now, did you get a registered receipt for the letter that you sent to the union?
[36] A. No, I did not.
Q. I don't mean a registered return receipt, but did you keep a copy of the registration of the letter?
A. Yes, I did.
Q. I show you a document marked as General Counsel's Exhibit 3 and ask you if this is the letter that you sent to the company?
A. Yes, sir, it was.
Q. I show you another document marked for identification as General Counsel's Exhibit 3-A, a registered receipt—are these registered receipts for the letters you sent to the union and the company?
A. Yes, sir. They are.

MR. JOHNSTON: At this time, I would like to offer General Counsel's Exhibits 3 and 3-A into evidence, with permission to withdraw 3-A to make a photostatic copy.
TRIAL EXAMINER: If there is no objection, they are received.

* * *

Q. (By Mr. Johnston) Now, the letter that you sent to the union, did you receive any reply from that letter about your resignation?
A. No, I did not.
Q. During the strike?
[37] A. Not until after I sent the letters.
Q. Do you recall how long after you sent the letters you returned to work?

A. September 25 was when I went back to work, I think.

Q. Did you ever receive any notation from the union you had been fined for working during the strike?

A. I did.

Q. Do you recall the amount of the fine?

A. $450.00.

Q. Had you ever received any warning you would be fined for working during the strike?

A. No warning.

Q. Did you ever receive any notification that legal action would be taken against you if you didn't pay the fine?

A. Not until after I received this letter.

Q. Do you recall who it was from that you received it?

A. From the local union.

Q. Have you ever been notified that this fine has been rescinded?

A. No, I haven't.

* * *

CROSS EXAMINATION

* * *

[38] Q. Now, Mr. Groat, when you joined the International Association of Machinists, did you join Local 751 or Local 405?

A. I joined the union here.

Q. Local 405?

A. Local 405, yes, sir.

Q. In fact, Mr. Higgins signed you up in the local, didn't he?

A. I believe he did.

Q. Mr. Bud Higgins?

A. Yes, sir.

Q. You joined it voluntarily?

A. Yes, sir. I did.

Q. Do you remember when you joined it?

A. It wasn't too long after I went to work—the date definitely, no.

[39] Q. Did you know that around September 15, 1965 the contract between Boeing and the International Association was about to expire?

A. I did, sir.

Q. Were you notified that a meeting would be held on the 15th of September?

A. Yes.

Q. Did you attend the meeting?

A. I did not.

Q. At the time, you were a member of Local 405?

A. I was.

Q. Now, did you know, when the picket line went up around the 16th of September?

A. I did, sir. I was there that morning.

Q. Did you participate in the picketing?

A. I did not.

Q. All right, now, the return receipts that have been offered in evidence as General Counsel's Exhibit 3-A, do they indicate that your letter was sent on September 22? Is that the approximate date you sent it?

A. Yes, sir. That is correct.

Q. Did you sent it to Local 405 as well as to Local 571?

A. No. I did not.

Q. You did not send it to Local 405?

A. No.

[40] TRIAL EXAMINER: Is there any particular reason why you did not sent it to the local?

A. THE WITNESS: I was told I didn't have to.

Q. (By Mr. Barker) Who told you you didn't have to?

A. It was general all over the plant that you didn't, you just had to send the letters to Seattle.

Q. Well, now, at the time you were not in the plant, were you, you hadn't gone back to work?

A. No, I was not.

Q. Where did you get this information out of the plant?

A. Well, before—Before this strike was ever declared, it was all over the plant what you could do if you wanted to get out of the union in time.

Q. Out of the union?

A. Out of the union, yes, sir.

Q. You say it was all over the plant? You mean there was general talk?

A. Wasn't general talk, but, I mean, you could find out about it, yes.

Q. You could find out about it? From whom did you find out about it?

A. One of the supervisors.

Q. I see. One of the Boeing supervisors?

A. Yes, it was.

A. Yes, it was.

Q. After this strike started, did you again talk to this [41] supervisor over the telephone?

A. I did not.

Q. You did not?

A. No.

Q. Did you talk to any other supervisors?

A. No, I did not.

Q. Talk to any other Boeing Personnel?

A. No, sir.

Q. You were informed by a supervisor that to get out of the union all you had to do was send a letter to the Local 751?

A. More to that effect, yes.

Q. Was this in connection with the discussion of whether you would come back to work in the event of a strike?

A. No, sir. It was not.

Q. At the time, there was talk of a strike over the contract?

A. Yes.

Q. And this was prior to the union actually voting to strike or——

A. No. It was after they voted.

Q. It was after they voted to strike?

A. Yes.

Q. All right. So you wrote this letter so that you could go back to work in the plant?

[42] A. Yes, I did.

Q. If there had not been a strike of a picket line, you would not have written this letter?

A. No, I would not.

Q. And you, after you wrote the letter, you didn't wait until you received the return receipt, did you?

A. No, I think it was three days after I sent the letter I went back to work.

Q. All right, you had not yet known whether they had received the letter, or not?

A. No, I didn't ask for a return receipt.

Q. Now, Mr. Groat, you were notified of the charges against you and the time and the place of the trial?

A. I was.

Q. By the union—Did you appear at that trial?

A. I did not.

Q. And after the trial you were notified of the fines that had been placed against you?

A. I was, sir.

Q. Did you make any effort to contact the union to have the fine reduced? Or, to escape the fine?

A. No, I did not.

Q. You haven't contacted the union since you were notified of the fine, have you?

A. No, sir.

[43] Q. You have not rejoined the union?

A. I have not.

Q. Were you aware that some of the employees who had been fined, later had their fines reduced or adjusted?

A. Not to my knowledge, no.

Q. And you kept on working from the 25th of September through the end of the strike?

A. Yes, sir.

* * *

Q. (By Mr. Barker) Did you have in your possession a copy of the International Association of Machinists?

A. I have seen it, yes.

Q. You knew that you could be fined for going through a picket line of the Machinists?

A. Yes.

Q. And, so for this reason in order to avoid a fine, you [44] wrote a letter telling them you were resigning from membership?

A. Terminating from the union, yes.

* * *

JOHN CONNIFF

was called as a witness by and on behalf of the General Counsel and, having been duly sworn, was examined and testified on his oath as follows:

* * *

A. John Conniff, 3642 Meadowdale Drive, Slidell, Louisiana.

Q. Mr. Conniff, were you employed by the Boeing Company at the Michoud Plant at the time of the strike in 1965?

A. Yes.

Q. Approximately, when, did you go to work for the Boeing Company?

A. May of '64.

Q. And that was at the Michoud Plant?

A. Yes, sir.

Q. Were you a member of the Boosters Lodge 405?

[45] A. Yes.

Q. And you were a member at the time that the strike occurred?

A. At the time that the strike occurred?

Q. Yes, at the time the strike occurred.

A. Yes, I was a member at the time the strike occurred.

Q. Did you make any effort to resign from the union?

A. Yes.

Q. Would you tell the Court?

A. The three letters I sent the union and the company?

Q. When did you—do you recall when you sent these letters?

A. On the 19th of September.

Q. Who did you send the letter to, then?

A. The company, the union, in Seattle.

Q. The union in Seattle, 751?

A. Right.

Q. How did you send these letters?

A. The ones on——

Q. September 19th.

A. 19th, well, regular mail.

Q. Did you keep a copy of these letters?

A. Yes, I did.

Q. Now, you sent those regular mail, did you later send any other letters?

[46] A. Yes. I sent additional letters, this is on, actually, the 21st, I believe, the 20th, after I returned to work—certified, registered mail.

Q. Who did you send these letters to?

A. To the company and the union, again.

Q. Did you keep a registration slip on these letters?

A. Yes.

Q. I show you a document marked for identification as General Counsel's Exhibit No. 4, Mr. Conniff, and ask you if that is the copy of the first letter which you sent?

A. Yes.

Q. And I show you a document marked for identification as General Counsel's Exhibit 4-A and one marked General Counsel's Exhibit 4-B, and ask you if this is a copy of the registered letter and registered receipt that you mailed?

A. Yes, sir. Yes, sir, it is.

MR. JOHNSTON: I now offer General Counsel's Exhibits 4, 4-A, and 4-B into evidence.

TRIAL EXAMINER: Is there any objection?

MR. STOUT: No objection.

MR. BARKER: What is the date on that one, the 21st?

MR. JOHNSTON: Registered the 21st.

MR. STOUT: The date of the letter, or the date of the receipt?

MR. JOHNSTON: The date they were mailed certified.

[47] TRIAL EXAMINER: Any objection, Mr. Barker?

MR. BARKER: No, your Honor.

TRIAL EXAMINER: Very well, they are received.

* * *

Q. (By Mr. Johnston) Did you ever receive a reply from the union about your resignation?

A. No.

Q. Did you ever receive any notification from the union that you had been fined?

A. Yes, I did, in a letter.

Q. Do you recall the amount of the fine?

A. No. I think it was $450.00.

Q. Did you ever pay this fine?

A. No.

Q. Did you, at any time, receive a letter from the union's attorneys that legal action had been instituted against you?

A. Yes.

Q. To your knowledge, was legal action instituted against you?

[48] A. No. I don't think so.

Q. Were you ever served with any citation?

A. Yes, I was.

* * *

Q. (By Mr. Johnston) Now, I think you mentioned a minute ago, when did you first return to work during the strike?

A. On the 20th of September.

Q. You had not worked during the strike up until that time?

A. No.

Q. You testified that you sent the resignation letter to the union in Seattle? Why did you send it to Seattle?

A. This was after I got to work and I had already sent one set of letters to Seattle.

Q. Yes?

[49] A. Well, I called up my boss and asked him where we should send the letters of resignation to the union. He said all letters would have to be sent to Seattle, not down here. He didn't ask me whether I was coming back to work or not. That was it.

Q. Have you ever been advised the fine has been revoked, or anything?

A. No.

• • •

CROSS EXAMINATION

Q. (By Mr. Barker) Who is your boss, Mr. Conniff?

A. Beg your pardon?

Q. Who was your boss, at the time?

A. Paul Bowman.

• • •

Q. And after the strike started on the 16th, you just picked up the phone and asked him where you should send thhe letter to resign from the union?

A. No, sir. I was out of town until the week-end and come back into town, and when I got back into town, I knew that the union had gone on strike and thought about resigning. I made up my mind I was going to, so I called him up and asked [51] him where—whether I should actually notify the company. He said, "You notify the company and the union, both, in Seattle."

Q. 751?

A. Yes, I believe that is it in Seattle and I sent the letters to Seattle to the company and to the union, both.

Q. What was Mr. Bowman's position, at the time?

A. He was unit chief in material.

Q. Unit chief in material?

A. Yes, sir.

Q. He had nothing at all to do with Local 405 or 751, did he?

A. No, sir.

Q. Did you call Local 405 to find out how you could resign?

A. No, I didn't.

Q. What was your purpose in resigning?

A. I had just got back off my honeymoon, spent all our money—had to go to work—Like I said, I thought about

this while I was on my honeymoon. We heard on the radio that the strike had taken place.

* * *

[52] Q. You wrote the letters in order that you could go back to work as you felt——

A. Yes, it terminated my membership from the union.

Q. Yes. And your purpose in terminating your membership; was to return to work?

A. Yes.

Q. Now, after you wrote the letter of September 19, as I understand it, you went back to work on the 20th of September?

A. Yes.

* * *

[53] Q. In this letter, 4-C, going back to 4-C, you use this language;

> "I find it necessary, at this time, to notify you of my resignation from Local 405, International Association of Machinists, New Orleans, Louisiana. My job does not require union assistance, any longer. Therefore, I would appreciate [54] you dropping me from the union membership."

Did you compose that letter, or was that language suggested to you by someone else?

A. I composed the letter, I know, in both cases.

Q. You knew at the time that the contract had expired, I assume?

A. Yes, sir.

Q. Was your job, at that time, covered by the contract that had expired?

A. (no response)

Q. I mean, were you represented by the union, on your job?

A. You mean at work?

Q. Yes.

A. Yes. In department I was in, yes.

Q. And you returned to work in that same department?

A. Yes, I did.

Q. Now, did you receive a notification of charges that had been placed against you?

A. Yes.

Q. And, of the substance of the charges and the time and the date of the trial?

A. Yes.

* * *

[55] Q. (By Mr. Barker) After you received this letter notifying you of the trial and charges, did you appear for trial?

A. No, sir.

* * *

[56] Q. My question was: Did anybody advise you not to appear for trial and who were they?

A. No. Nobody advised me not to appear for trial.

Q. When you got the notice of trial did you discuss it with the same—your supervisor, Mr. Paul Bowman?

A. No, sir.

Q. Did you discuss it with any other company official?

A. No, sir. I don't believe so.

Q. All right. You knew you had a right to appear for trial—at the trial?

A. Yes.

Q. All right. Now, after you chose not to appear at the trial, were you notified of the levying of a fine?

A. Yes, sir.

Q. In the sum of $450.00?

[57] A. Right.

Q. Were you familiar with the provision of the constitution of the International Association of Machinists?

A. No, I am not.

Q. Had you ever asked for or received a copy of the constitution?

A. Yes, I have. I have read some of it.

Q. You had read from the constitution?

A. Yes.

Q. You knew that you could be fined and so forth, for going through a picket line?

A. I don't believe so.

Q. All right. In fact, the letter sent you referred to the constitution in certain articles in it, did it not?

A. Yes.

Q. And now, after you were notified that you were fined, did you make any effort to contact the union to have the fine relieved or remitted?

A. No, sir.
Q. None, whatsoever?
A. No.

* * *

[53] Q. I will show you your exhibit, General Counsel's 4-C, which is a copy of a petition and citation filed in the First District Court of the City of New Orleans by the late Thomas J. Meunier, of my law firm. (presenting document) You were served with a copy of this citation and petition, making demand upon you of the payment of the fine, plus interest and cost, were you not?
A. My mother was.

* * *

[59] Q. All right. When you were served with a copy of this, what, if anything, did you do?

MR. STOUT: I object. It is immaterial, what defensive steps this witness may have taken in the First District Court in New Orleans, to the issues of this case.

Q. (By Mr. Barker) Did you turn this over to the company, and are they defending this suit for you?

MR. STOUT: Same objection, your Honor.
MR. JOHNSTON: We would have objected earlier on the basis of the relevancy of this line, as the company has not been charged with anything.

* * *

[60] TRIAL EXAMINER: All right. I will permit it.

Q. (By Mr. Barker) You may answer the question.
A. Yes, sir. I did take this to work.
Q. Take it where, sir?
A. To work.
Q. You didn't take it to work, you took it to Personnel, is that what you are telling us?
A. You confuse me with "Personnel."
Q. Took it to Labor Relations.
A. Yes.
Q. Did they assume the defense of that suit?

MR. STOUT: I object on the grounds, one, that it is calling for a conclusion of law and is beyond the scope of knowledge of this witness; secondly, even if the company did undertake to aid in the defense of the civil suit, I think the Leeds &

Northrup Case clearly provides that the company [61] may do so.

TRIAL EXAMINER: I am certainly not agreeing with Mr. Barker's contention that it would be a defense, that it is a complete or a partial justification for what the union did, but——

MR. STOUT: The fine had already been levied, at this time, your Honor.

TRIAL EXAMINER: I realize that but if it is a part of a fabric, as the union alleges, this whole thing, I think they can ask that. Go ahead.

Q. (By Mr. Barker) Did the company assume the defense for you?

A. Yes, sir. I think so.

Q. The company's attorneys are handling it, are they not?

A. Yes.

* * *

Q. Changed lawyers, is that correct? They changed from Mr. Bernie Marcus to Kullman & Lang—You are not paying the company lawyers, the company has assumed the burden of paying these lawyers?

A. I believe so.

* * *

[62] MR. JOHNSTON: Counsel for the parties will stipulate a document marked General Counsel's Exhibit 5, a copy of the Constitution of the International Association of Machinists and Aerospace Workers was in effect at the time of the strike.

Counsel for the parties will stipulate that a document marked General Counsel's Exhibit 6, is the copy of the by-laws of Booster Lodge 405, International Association of Machinists, in effect at the time of the strike.

Counsel for the parties will stipulate that a document marked General Counsel's Exhibit 7, is a copy of the Collective Bargaining Agreement that expired in September 1965.

[63] Counsel for the parties will stimulate a document marked General Counsel's Exhibit 8 is a copy of the Collective Bargaining Agreement executed in October, 1965.

TRIAL EXAMINER: General Counsel's Exhibits Nos. 5 through 8 are received, pursuant to stipulation of the parties.

(The above-referred to documents, General Counsel's Exhibits Nos. 5 through 8, were marked for identification and received in evidence).

MR. JOHNSTON: Counsel for the parties will stipulate that a document marked General Counsel's Exhibit 9, is a letter from Gene P. Griffith, Secretary-Treasurer, of Local Lodge 406 addressed to the company, which letter was sent to the company by the union on November 14, 1965. It contains an attached list of names of employees.

MR. BARKER: What is the date on that?

MR. JOHNSTON: November 4, 1965.

TRIAL EXAMINER: Mr. Barker, is 751 the District as distinguished from the Local?

MR. BARKER: That is correct, your Honor. That is correct.

TRIAL EXAMINER: I take it, Local 405 is where—within the 751 District?

MR. BARKER: No, it isn't.

TRIAL EXAMINER: What district is 405 in?

[64] MR. BARKER: It is not within any District. Local—I will get the precise——

I will be glad, at this time, to stipulate as to the precise situation.

MR. JOHNSTON: Your Honor, the old contract that expired, 405 was not a party in the signature to the contract. They came in existence after the contract was executed. We intend to put on evidence showing why these letters would have been sent to District Lodge 751 by virtue of some of the terms in the expired contract.

MR. BARKER: I will propose a stipulation as to the situation with respect to Local 405 and District 751.

Could we go off the record for just a minute?

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

MR. BARKER: We propose a stipulation for explanation of the relationship between the District Lodge, 751, and Booster Lodge 405. I am informed that District Lodge 751 is a District Lodge in Seattle, Washington, made up of six local unions representing the employees of the Boeing Company, and contracting with the Boeing Company, that in 1963, Booster Lodge 405 was established as a remote

lodge in what has been defined in the contract then in existence as a remote location meaning, remote from Seattle, Washington and was established at New [65] Orleans, Louisiana, representing the employees of the Boeing Company at the New Orleans, Louisiana operation. The particular definition of primary location, which Seattle is one, where 751 is located, and remote location, of which, the Booster Lodge 405 is one, are designated by the company in accordance with the Agreement and the explanation appears at pages 7 and 8 of the Collective Bargaining Agreement, effective May 17, 1963, General Counsel's Exhibit No. 7.

Among other locations under this same remote arrangement, are locals at Huntsville, Alabama and at the Mississippi Test Facility, both of which are remote from New Orleans. The Mississippi Test Facility is located at Lumberton, on the Pearl River, just over the line from Louisiana.

TRIAL EXAMINER: So Stipulated.

MR. JOHNSTON: Did you include the Mississippi Test Facility, indicate they had a separate local?

MR. BARKER: We indicated that it was a separate, remote location.

MR. JOHNSTON: Covered by Local 405?

MR. BARKER: Correction in the stipulation. Local 405 at the time of the contract—at the time the contract was in effect—covered the employees at the Mississippi Test Facility and at Huntsville, Alabama, as well as, the Michoud Plant.

TRIAL EXAMINER: Do you so stipulate?

[66] MR. JOHNSTON: Yes, we will stipulate to that with reservation to put on additional evidence, if we deem it necessary.

MR. STOUT: The charging party feels the same as General Counsel.

TRIAL EXAMINER: Are there six locals in District 751 all in the Seattle area?

MR. HILTON: Seattle-Renton area.

TRIAL EXAMINER: Is the name Boosters Lodge—is Booster a type or place or what?

MR. HILTON: This was the name that the members chose that this location be called, down here.

TRIAL EXAMINER: I see.

* * *

[67] AFTERNOON SESSION

TRIAL EXAMINER DONOVAN: On the record.

MR. JOHNSTON: Was General Counsel's Exhibit No. 9 received?

TRIAL EXAMINER: Well——

MR. JOHNSTON: I think the question came up about the difference between 751 and 405. At the time, I proposed a stipulation on it.

TRIAL EXAMINER: Well, did you agree on the stipulation?

MR. JOHNSTON: I was going back to the stipulation before then. General Counsel's 9 was a document which we stipulated to was a letter sent from the Union to the company.

TRIAL EXAMINER: I will receive it if it isn't already.

* * *

[68] MR. JOHNSTON: Counsel for the parties will stipulate to certain exhibits being received. The document marked for identification General Counsel's Exhibit 10 is a copy of a form letter sent to the employees concerning fines levied against them, or rather concerning if the hearing would be held on charges for working during the strike. [69] In the body of the letter it names a specific date here, but the trials were held at different dates. During the period of time from November through December 5, '65, a copy of the form letter sent to the various individuals.

TRIAL EXAMINER: The union and so forth—is there any contention about the internal processes of the imposition of the fine, whether the Union followed its rules, or whether the rules were fair on their face, or anything of that nature?

MR. JOHNSTON: We are not raising that, the question that the procedural aspects of the trial were in any way unfair.

TRIAL EXAMINER: In your—in other words, you are making the assumption that everything was proper within the union, but that the fine is excessive and so forth?

MR. JOHNSTON: Correct. We are not talking about the procedure as such. The threat of being fined and so forth would be part of the violation that the fines were excessive.

We were not talking about the internal procedures of the trials themselves.

MR. STOUT: We agree with General Counsel, but reserve the right to question the regularities on internal procedure. Part of the procedure itself is valid.

MR. BARKER: Mr. Stout represents the charging party.

I don't believe he can take that position inconsistent [70] with that of General Counsel.

TRIAL EXAMINER: We will see, we will see what you offer. Maybe you won't say anything further on it. I don't know.

I raised that because I would like to nail this thing down, and eliminate if possible the going into the procedure at the time——

MR. STOUT: No, sir, I don't intend to do that in this trial. Just reserve position.

MR. JOHNSTON: May I have a document marked for identification as General Counsel's Exhibit 10, another form letter sent to the employees during the period earlier stated, notifying them a fine had been levied against them, explained within the body of the letter; and a document marked as General Counsel's Exhibit 12, is a copy of another form letter sent to the employees in the same period, determining the fine; a document marked General Counsel's Exhibit 13 is a copy of another form letter dated November 3, and sent to the employees who were fined; a document marked General Counsel's 14 is a copy of another form letter November 3 to—sent to the employees.

The difference in the November—the two letters, one that is explained within the body itself. Some were found guilty of crossing the picket line, and others were found guilty on their own admission. But it is explained in [71] the body of the letter.

* * *

MR. JOHNSTON: The last two, 13 and 14, were November 3, 1967.

TRIAL EXAMINER: Unless you want to hold the originals for some reason, just give me the whole works. You don't have to take them apart.

MR. JOHNSTON: Another document, General Counsel's Exhibit 15, is a copy of a form letter that was sent to the employees whose names are attached to this exhibit, about 91 names on this list, sent to them on or about the date indicated. That is a letter from the union's attorney, the late Thomas Meunier; a document marked General Counsel's Exhibit 16 is a document showing the names of those employees fined and the amounts that they were fined. The first sheet is a captioned list of those fined, as they appear in the Local 405 minute books, at the beginning of the top of the fourth page is a notation "50 per cent fines", and

these employees were fined $450, but later reduced or in lieu of paying half of what they earned during the strike; opposite that is a column listed Collected. It shows the amounts of various individuals paid and those who have paid in full.

[72] There is a notation PIF after it on the last page of that document. Three names are there, which two are found not guilty, and one was mistrial, and not retried.

MR. BARKER: Do you stipulate the letters to the authenticity of the documents, as well as what is your proposal? This was taken from the minutes of the organization?

MR. JOHNSTON: Yes, we will stipulate to that. We had one just a few discrepancies in that list, and the letter Mr. Meunier sent to the 91—of names that he gave had been sent, they were fined $450, and a similar list sent to them threatening the court action, not listed on the last exhibit there, but I think that would be a matter for compliance later on, assuming a favorable court order is rendered.

Otherwise we will stipulate to the authenticity of the fines.

MR. BARKER: All right, that is satisfactory.

MR. JOHNSTON: Another document marked General Counsel's Exhibit 17 is a list of names of employees who were fined $450 working during the strike 1965. The court action suits have been filed against these individuals similar to the suit filed against Mr. Conniff, which is in evidence as General Counsel's Exhibit No. 4-C, with the exception these were suits that have been filed within the [73] last week, that is——

MR. BARKER: Some of them were earlier suits. I am not sure exactly which ones. Perhaps Mr. Stout can help me out on that. I believe the first three are earlier suits.

MR. STOUT: Mr. Barker, as far as I can tell from my file, the only suit where we have entered an appearance has been the one where Mr. Marcus originally filed, that would be the Conniff suit.

MR. JOHNSTON: They have been filed.

MR. BARKER: Some have been filed recently. All right.

MR. JOHNSTON: The document marked General Counsel's Exhibit No. 18 is a list of names of those employees who wrote resignation letters to—that were received by the District Lodge 751 in Seattle, with the date opposite each name being the date the letters were postmarked.

MR. BARKER: We do not contend or see the relevance of

the postmark date on the letters as distinguished from the date that the letters may have been received by 751. I personally do not quite understand the General Counsel's information on that. We will stipulate that our investigation indicates from checking with letters on hand that the dates that appear on that list appear to be the dates that the letter received was postmarked or the date that the letter received was itself dated. We are not certain that [74] that is true in every case. Am I correct in that?

* * *

MR. JOHNSTON: I am sorry. In an off the record discussion, Mr. Barker and I were discussing amending the stipulation on the last exhibit, that the date indicated opposite the name of each employee on the list is the date that the letter was either postmarked or received by District Lodge 751 in Seattle. Is that correct, Mr. Barker?

MR. BARKER: Yes, that is correct, and I might explain that the confusion arises in that the transmittal memorandum originally sent October 6th, 1965, to Mr. Harold Higgins from Walter E. Berg, the District Secretary-Treasurer indicated that it was a list of certified and registered letters for the dates received.

A later checking by the Regional Office of the Labor Board indicates that the dates may be the date where postmarked, and checking with the letters in evidence as Exhibits indicates that the dates as to those two letters, Mr. Conniff and——

MR. JOHNSTON: Mr. Merriwether I guess, and Mr. Conniff. [75] MR. BARKER: Mr. Merriwether and Mr. Conniff indicate that the date on the list is the date that they mailed their letters.

TRIAL EXAMINER: Yes.

MR. JOHNSTON: Or either, instead of Mr. Conniff, Mr. Groat, I think. But the record will show I——

TRIAL EXAMINER: Mr. Johnston, is that material to your contention that these resignations were received before the people crossed the picket line or went to work?

MR. JOHNSTON: The argument we would make was wherever they were posted in the mail, if it was prior to the time they went to work it would be material, it would be the posting time that we contend would be material.

Second would be when it was received. The first argument was when they were posted.

TRIAL EXAMINER: It is difficult for you to make the argument about the receipt, it seems to me, because of the nature of the stipulation. I mean the stipulation is either that they were posted or received. So it seems to me you have to go on what is from your standpoint potentially the weaker position, that they were at least posted on the dates. I don't see how you can argue because of the nature of the stipulation that they were in fact received on the dates, unless you have positive evidence.

MR. JOHNSTON: Well, if we go by the union—if [76] they were received on that date, if that is the receipt date, that means they were postmarked earlier than that.

TRIAL EXAMINER: Obviously.

MR. JOHNSTON: Right.

TRIAL EXAMINER: But from your standpoint, as I understand you, the best position is that if you can assert that they were received on the date, then you can show that they were postmarked before then, and were mailed before then, and so forth. But if you have to rely only on the fact that, well, at least they were postmarked on these dates, I don't see how you can argue the receipt argument.

MR. JOHNSTON: Well, we have a problem primarily here on proof, that the records initially went to Seattle; the withdrawal letters themselves are not available. Our records in Seattle indicated that date was the date of posting, as opposed to receiving. But the union contends that that is or may be the receipt date.

MR. BARKER: We don't know, because we had a communication thing that it was the days the letters were received. This may be just a careless writing at the time. It was not important to the writer, a checking of the list against the actual two letters in evidence indicates the date on those two letters were the dates they were postmarked.

TRIAL EXAMINER: Can you say what would be the normal period of [77] delivery from say this town to Seattle or wherever the district would be?

MR. JOHNSTON: I——

TRIAL EXAMINER: I mean, let's take an order mailed first —never mind air mail, or is it impossible to predict these dates?

MR. JOHNSTON: It may be a better service today than it was three years ago.

MR. STOUT: Your Honor, our experience with other

Seattle plants, our experience is to three day delivery, usually two days, depending on when it gets in the mail.

MR. JOHNSTON: I think about the only argument we could make would be on the basis then of say the letters we already have in evidence, showing when they were mailed and received, and use that as a guide, unless we could agree on something. Do you have any suggestion, Paul?

MR. BARKER: No, I have no suggestions.

MR. STOUT: I would like to correct a misstatement I made a moment ago in connection with the suit pending in Civil Courts. I stated that Conniff was the only one where we entered an appearance. I find on making a further look in my file Clinton Whiting suit, IAMAW, Local 405, vs Whiting, the same court apparently, the same type of suit. I say we; I mean my law firm.

MR. JOHNSTON: Continuing on as stipulations on [78] the record, I have four documents marked as General Counsel's Exhibit 19, which is a Boeing personnel record for the week ending 9-16-65, and General Counsel's Exhibit 20, Boeing personnel record for the week ending 9-23-65. 21 is a Boeing payroll record for the week ending 9-30-65. General Counsel's 22 is a payroll record for Boeing personnel, week ending October 7, 1965.

I would point out for the record that on General Counsel's Exhibit 20 there is set forth the hourly rate of pay of each employee at the time of the payroll, which would show the hourly rate of pay at that time.

I might also point out that these records—payroll records—would show the day each employee worked during the period of the strike, a few days before the strike started, and a few days after the strike ended. The payroll records are not alphabetical, but they were numerical by the last four digits of the employees' Social Security card.

So for the purpose of working with the payroll records, I have another exhibit marked General Counsel's Exhibit 23, which is an alphabetical listing of all the employees. 23, correction, this is General Counsel's Exhibit 23. Exhibit 23 is an alphabetical listing of employees and their clock number is opposite their names.

TRIAL EXAMINER: You have no—you have prepared no collation between the people that you contend were [79] discriminated and the payroll?

* * *

MR. JOHNSTON: We are going to show all this information, pull out all the material on the individuals we claim have been discriminated against. These would be particularly with those that fall in the category of having resigned, prior to the time they went to work. We have got to go to the receipt posted, and the payroll records.

TRIAL EXAMINER: I just wanted to be sure that somebody was going to do that.

Do you join in the stipulation?

MR. BARKER: Yes.

TRIAL EXAMINER: They are received.

(The documents above referred to were marked General Counsel's Exhibits Nos. 10 through 23, were marked for identification and received in evidence.)

* * *

[80] MR. JOHNSTON: I have a stipulation to propose. Counsel for the parties stipulate between themselves that the expiration date of the old contract that expired September 15, 1965, and the execution of the new contract was in October. This was no contract in effect during that period.

MR. BARKER: So stipulated.

MR. STOUT: Yes, sir.

TRIAL EXAMINER: Stipulation received.

* * *

[82] RONALD FARENBACHER

was called as a witness by and on behalf of General Counsel, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

A. Ronald Farenbacher, 2821 Packenham Drive, Chalmette.

Q. Were you employed at the Boeing Company, the Michoud plant, at the time the strike of September 1965?

A. Yes, I was.

Q. Do you remember—did your wife also work there?

A. Yes.

Q. What is her name?

A. Dorothea Fahrenbacher.

Q. Were you a member of Booster Lodge 405 at the time?

A. Yes.

Q. At the time of the strike, did you make any attempt to resign from the union?

A. Yes, I did.

Q. Would your state what you did?

A. I wrote the required letters. My wife and I both wrote the required letters, and sent one copy to the District in Seattle, the union in Seattle, and one to the company, and——

Q. Do you recall when you wrote these letters?

A. The 20th of September.

[83] Q. Do you recall when you mailed them?

A. The same day.

Q. How did you send these letters?

A. Sent them by Registered Mail.

Q. Who mailed the letters, do you recall?

A. My wife and myself, both.

Q. Did you see her write her letter?

A. Yes.

Q. Did you see her mail her letter?

A. Yes.

Q. Did you get Registered Receipts on the letters?

A. Yes, I did.

Q. Did you keep a copy of the letter you sent to the union?

A. No, I didn't.

Q. Mr. Farenbacher, I show you a document marked for identification General Counsel's Exhibits 25, 26 and 27, 27-A and 27-B and 27-C, and ask you if these are the letters which you and your wife sent and the registered receipts showing to the company?

A. Yes, they are.

Mr. Johnston: At this time I offer General Counsel's 25, 26, 27, 27-A, 27-B and 27-C into evidence.

Trial Examiner: I believe you said no objection, Mr. Barker?

[84] Mr. Stout: I have no objection.

Trial Examiner: They are received.

* * *

Q. Do you recall when you went to work during the strike, what date?

A. The 21st of September.

Q. And when did your wife go to work, or did she work during the strike?

A. The same day. She did work during the strike, the 21st.

Q. Did you ever receive any notation from—notification from the union concerning the letter of resignation you sent?

A. No, I didn't.

Q. Did you later receive word you had been fined by the union as a result?

A. Yes, I did.

Q. Those records are in evidence. Prior to the strike, did you work every day for a period leading up to the strike?

[85] A. No, I didn't.

Q. Would you—would you tell the Court why you were off work, if you were off work?

A. Well, I know there was—well, there was a hurricane. I'm not sure of the exact date of it, but it, the actual expiration date of the contract fell somewhere within that period, after the hurricane. And so I wasn't working at the time that the contract expired.

Q. Why weren't you working?

A. Well, Chalmette was isolated. It was impossible to get there. To get in or out for a while there. I'm not sure how long.

Q. You were living in the Chalmette area?

A. Yes, I was.

Q. Did you suffer any damage due to the hurricane to your home?

A. I didn't. My family did, my mother and father and in-laws.

Q. And do you recall about how long you were off work due to the hurricane?

A. I'm not sure. It may have been somewhere around a week, possibly two weeks. But the first date that I came back to try to go to work, I didn't realize that the strike had been—that it has taken place. When I went in, it was the 20th. We saw the picket up. We turned around, went [86] home and wrote our letters, and returned the following day.

Q. Did your wife work during the time you were off because of the hurricane?

A. No.

• • •

CROSS EXAMINATION

Q. (By Mr. Barker) You are not telling the Court you couldn't get back to work after the hurricane for a period of a week to two weeks, are you?

A. Yes, I am.

Q. The transportation was so bad from Chalmette, you couldn't get from Chalmette across Paris Road, or by way through the city of New Orleans, to the plant at Michoud?

A. I do.

Q. In other words, you never left the area of Chalmette for a week or two weeks?

A. From the time when the hurricane struck, and the time I went in, on the 20th, I didn't leave Chalmette.

Q. You could have gotten out if you wanted to, couldn't you?

A. No, I'm not sure how long it was isolated, but there was water on Parish Road and water just below the Industrial Canal.

• • •

[87] Q. Yes. Now, you remained out from the date of the hurricane, September 9, 1965, until September 20, 1965. Did the company penalize you for staying out during this period of time?

A. Well, they didn't pay me.

• • •

[88] Q. You mentioned on your direct testimony that you and your wife wrote the required letters to Seattle. What do you mean by required letters?

A. Well, it was the—we were informed that in order to get out of the union, we had to write a letter and send it Registered to the union, in Seattle, and one to the company, which we did.

Q. Who informed you of that?

A. I believe my wife is—union steward—I'm not sure who it was.

Q. Did you talk to any of the company representatives?

A. No, I didn't phone the company that day. No.

• • •

[89] Q. (By Mr. Barker) Now, Mr. Farenbacher, after you returned to work, you were notified that you would be brought to trial?

A. Yes.
Q. Did you appear at your trial?
A. No, I didn't.
Q. Neither you nor your wife, is that correct?
A. That's correct.
Q. And after the trial did you make any further effort to contact the union with reference to your finances?
A. No, I didn't.

* * *

Q. You have made no request and no effort to have your [90] fine reduced, have you?
A. No.

* * *

JOHN E. NAU

was called as a witness by and on behalf of the General Counsel, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q. What is your occupation, Mr. Nau?
A. I am the Labor Relations Manager for the Wichita Division of the Boeing Company.
Q. Did you serve in a similar capacity at the Michoud plant in New Orleans?
[91] A. I did.
Q. What period of time was that?
A. From April 1962 until October 1966.

* * *

Q. (By Mr. Johnston) Mr. Nau, when you were at the Michoud plant, for Boeing, would you describe what your duties were in the position you held?
A. My responsibilities were to handle the labor relations for the company, for the southeast portion of the United States, which includes New Orleans, Mississippi, Huntsville, Alabama, and the Cape in Florida.
Q. How long have you been working with the Boeing Company altogether?
A. Since April 1949.
Q. To your knowledge at the time of the strike, September 1965, were any instructions put out with respect to how

to answer the inquiries from employees about resigning from the Union?

A. Yes, definitely.

Q. Who prepared these instructions?

A. I did.

Q. Who were the instructions given to?

[92] A. They were given to the personnel manager in Huntsville, Alabama, who was my representative there, and to personnel representatives here in Michoud who handle the personnel office out at the plant.

Q. I show you a document marked for identification as General Counsel's Exhibit No. 28, and ask you if this is a copy of the instructions which you testified about?

A. This is correct, this looks like a carbon of the original letter.

Q. All right.

MR. JOHNSTON: At this time I offer General Counsel's Exhibit 28 into evidence.

* * *

TRIAL EXAMINER: I will receive it.

* * *

[93] Q. (By Mr. Johnston) Now, these instructions you testified who you gave them to; what was the purpose of the instructions?

A. These two individuals I gave them to headed up the personnel groups that would undoubtedly—their people would be contacted by the bargaining people regarding this question as to, in the event they cared to get out of the union, what approach or method they should use, so to make sure that, No. 1, there was no encouragement to anyone to withdraw their membership in the union, and No. 2, to inform them as to the procedure that had been used in previous years. I put this out to the personnel manager in Huntsville, Alabama, and to the supervisor over the personnel group here at the Michoud plant.

Q. You testified about the procedure which had been used over previous years. To what are you referring now?

A. In previous years where he had an, either an escape period in the contract—

MR. BARKER: We object. Wholly irrelevant and immaterial. There is no way we can cross examine this witness on this. It has no relevancy in this case.

The company is not on trial as to the policies [94] in previous years. It has nothing to do with the organization or the strike that happened at the Michoud plant.

MR. JOHNSTON: Your Honor, I think it is certainly material, and relevant here. You had the provision in the collective bargaining agreement which 405 was not a party to, but came into existence after the execution of the agreement that led up to the time of the strike, how employees might go about resigning from the union, or electing not to become a member, which is specified in the contract.

TRIAL EXAMINER: I will admit it.

MR. BARKER: We point out the contract expired at the time of the strike.

TRIAL EXAMINER: I take it this doesn't deal specifically with a particular contract period, but I understand it to be a general practice, how they operated or how the company thought they operated, and I can see where that can be of some help.

Q. (By Mr. Johnston) Continue, please.

A. In previous years the policy that was used by the company and the union—

MR. BARKER: We object to this witness testifying about any policy on the part of the union, unless he is referring to a specific document. This is a membership policy. That man is not a member of the union.

TRIAL EXAMINER: I think perhaps what you should [95] say is what the company did and what the union did, if you know specifically.

THE WITNESS: The company has in some previous years advised their employees that when there was an escape period in the contract, or in the case of 1962 when there were periods of no contract, that the general procedure to follow was to send a registered letter to the union and to the company, informing both parties that they wish to terminate their membership in the union, and to cancel their payroll authorization for union deduction. And in the past years, including 1962, this procedure was followed and accepted by both parties.

So when in 1965 it came up, and we again had a period of no contract, the employees were so advised of what the procedure had been the previous years, and that is exactly what I notified the appropriate personnel representatives as to—so to inform any individual who asked them whether they wanted to get out of the union, how to get out.

Q. (By Mr. Johnston) Now, with respect to the strike, we have in evidence the document, General Counsel's Exhibit No. 9. This is a letter addressed to you. Is that a letter you received from Mr. Griffith?

A. That is the letter I received.

Q. Attached to that are a list of names mentioned of employees written, certified letters either to District [96] Lodge 751 or 405 concerning terminating their membership?

A. Right.

Q. Did you have an discussion with Mr. Griffith concerning this letter, either prior to the time it was received or after you received it?

A. I did.

Q. Would you tell the Court what this conversation was, what conversation you had?

A. It has been a practice of the Boeing Company to work closely with the union in the year that I have been with the company, involving payroll deduction, because it is a complicated situation at the best, or at the least. So when all these letters were being sent to 751 in Seattle and to the union office in Seattle, and then being forwarded for the most part down to the union here, I requested from Mr. Griffith which again has been the practice in the previous years that if he would give me a list of all the people that sent letters to the union requesting termination, and then I would compare that with the list that I had compiled of the letters that the company received, then it would expedite the record, keeping on both part so that his organization would have a record as to the people who cancelled their payroll deduction so they could get their bookkeeping up to date as expeditiously as possible. So Mr. Griffith sent this letter to me with the names of these [97] people.

Q. To your knowledge, did the employees whose names appear on that list ever write letters to the company resign-

ing or advising you they had resigned from the union?

A. For the most part we received letters from the names of those employees that appear on the list that Mr. Griffith sent. There were a few names on his list that we had not yet received a letter from Seattle, and there could have been, and I think there were a few names that I received also from, in which Mr. Griffith had not received word from 751 in Seattle that they had received their letters. But for the most part, that list compared with the list that I compiled.

Q. Do you recall anything further discussed with Mr. Griffith?

A. No. I am of the belief that I, after receiving his list, that I compiled a list to compare with that, and in the exceptions, and I sent him that list. So again, for record keeping on both parts.

Q. Did Mr. Griffith raise any question about the letters, having been sent to District Lodge 751?

A. None.

Q. The employees on the list attached to Mr. Griffith's letter were payroll deductions stopped on those employees?

A. They were. They were not stopped immediately because, [98] if I recall it correctly, the strike lasted some 19 days. The letters were sent to Seattle. Many letters were received, letters in Seattle, from Seattle people. And it took, I think, through December before we completed our entire procedure of taking care of those people who requested payroll deductions to be cancelled, and refunded those in which we did take dues out, subsequent to October 21, 1965.

TRIAL EXAMINER: Were the payroll and payroll deductions made locally at the local plant?

THE WITNESS: Yes, here they made locally. It started out here in 1962, from Seattle. But by 1965 we did have our own payroll section.

Q. (By Mr. Johnston) On the checkoff, for instance, to whom did you remit the dues locally?

A. Initially the dues were remitted to my memory to 751 in Seattle, and then some time in the spring, I think, of 1963, 405 was officially made a Booster Lodge. I may be wrong in the date, but some time in the spring, I think at that time, I think they requested, 751 requested dues be for-

warded direct to 405. I am just scratching my memory on that.

* * *

[99] Q. (By Mr. Johnston) When the employees are hired or transferred when they first go to work for the company out here, are they given any instructions concerning the union security clause, or maintenance membership provision?

A. We have a contract being from 62 to District 65. It had a provision whereby when an employee hired in to Seattle, which was the primary location, or any remote location in Seattle, in which Michoud was a remote location, that two letters would be given to that employee. One was given at the time he was hired, which informed the employee that he would have thirty days in essence to make up his mind as to whether he wanted to join a union or not. In the event he did not wish to join the union, then between thirty and forty days after his date of hire, he would be requested to send a letter to the 751 union in Seattle, and the corporate labor relations office in Seattle, indicating that he did not wish to join the union.

If he did not send in that letter within the 30 or 40 day period, then he must join the union within the 30 days as a condition of continuing employment.

A second letter was given again informing him of the maintenanceship clause within the contract, and what he had to do if he cared not to join the union again, the dates on which he had to send his letters.

Trial Examiner: Suppose this new hire had signed [100] a card saying he did want to join the union, then what did he do?

The Witness: He did not sign the card with the company. If he cared to join the union, he contacted the union, or the union contacted him, and if he cared to join the union, then he signed the membership card that the union presented to him. And then the following month usually, along with the payroll authorization card, then the union presented the payroll authorization card to me the following month, to initiate payroll deduction on union dues.

TRIAL EXAMINER: Are you familiar with the union application card that was used at Michoud?

THE WITNESS: I haven't seen it for a couple of years, I think it is—I think it indicated that they agreed to certain dues and fees, and any increase that the membership might vote on subsequent to the signing of the card, and that he could cancel that card, I think it was something about cancellation of the card to the payroll department.

TRIAL EXAMINER: Do you happen to know what organization was named on the card?

THE WITNESS: I think Finance Payroll.

TRIAL EXAMINER: No, I mean which of the unions?

THE WITNESS: Oh, oh! Initially—initially—at the Michoud plant the card showed 751, and after 405 was put into operation they still used 751's cards for some time [101] before they came out with their own card.

TRIAL EXAMINER: Were the checkoff dues remitted to the local, or sent to the district?

THE WITNESS: Sent to the district 751 in Seattle, and I think I am going to have to say that I really don't know what date and what year that our payroll section upon request from the union in Seattle started to send these directly to 405. I don't recall. I don't know when that started, I really don't know.

Q. (By Mr. Johnston) I show you a document marked for identification as General Counsel's Exhibit 29, and ask you if these are the instructions you testified about (presenting document)?

A. They are the instructions.

* * *

Q. (By Mr. Johnston) Was there ever any amendment to the bargaining agreement that expired on September 15, 1965, [102] which is in evidence as Counsel's Exhibit No. 7, concerning whether notification was to be given and who it was to be given to, and if any employee elected not to become a member of the union?

A. You mean when the contract went into effect on October 21, 1967?

Q. Was—Mr. Nau, you were working at Michoud when the hurricane struck on September 9, 1965, which was Hurricane Betsy?

A. Yes.

Q. What effect did this have on the operation of the plant?

A. The plant was closed. You couldn't even get to the plant from my memory. My memory tells me that the hurricane occurred some time in the middle of the week, and the first time I was able to get to the plant was Saturday or was a Sunday. There was extensive damage at the plant, and the plant did not reopen until it was Monday or Tuesday of the week following, the following week, the week following that the hurricane occurred. This was also some few days before the expiration of the contract and the beginning of the strike.

Q. Did you ever have an conversation with any of the union officials or representatives concerning the effect of the hurricane on the employees in relation to the strike?

A. I did.

* * *

[103] Q. (By Mr. Johnston) Who did you have a conversation with?

A. Bud Higgins, Business Representative of 405.

Q. Would you tell us when this conversation occurred?

[104] A. This conversation I am sure I discussed it more than once with him, occurred subsequent to the hurricane and prior to the midnight of September 15, 1965, which was the termination time of the contract.

Q. Do you recall whether these conversations took place —where they took place, and who may have been present?

A. Took place in my office, I'm sure, in the Michoud plant. I—I'm not aware that anyone necessarily was present during these conversations.

Q. Would you please tell the Court what conversations took place on these occasions?

A. On these occasions I discussed the possibility of Mr. Higgins requesting through his International Union that the Michoud plant be spared a strike at this location on the basis of the—of the recent hurricane and the problems that many of our employees had, that both of us were well aware of, as far as losing all their belongings and their homes, and still a lot of them were missing from work because they just couldn't get to work, and we were going—doing everything we could to get help to these people. And it was my belief that since this operation had only been in effect, or

only in operation since 1962, and that the small number of people that we had here at the Michoud plant in relation to the overall bargaining unit in the corporation, that it would not hamper their position as far as negotiations were concerned, [105] and that it would be best for all concerned if he could give this serious consideration.

Q. Do you recall a thing further said during the conversation?

A. None, except as I said I had more than one conversation with him on this issue, and I didn't feel that he wanted to go this route.

Q. Is that what his reply was?

A. His reply was that in fact he did not even—he did not care to contact the International Representative regarding this subject, meaning the Vice-President of the International or the President.

Q. Approximately how many employees were in the bargaining unit at the Michoud plant at that time?

A. At the time of the strike, we had, oh, between eighteen and nineteen hundred employees in the IAMAW bargaining here at Michoud.

Q. Approximately how many employees do you have altogether at the plant, or did you have at that time?

A. I think at that time we had approximately 6,000.

* * *

Q. (By Mr. Stout) Mr. Nau, you answered or tried to show the language on the authorization cards signed by the employees authorizing the union to represent them. These shop [106] stewards in the various departments maintain possession of those cards, did they not?

A. Right.

Q. Now, you mentioned the practice that prevailed in previous strikes, as to notification, either strikes or when no contract was in effect, the practice of notifying the company and the union with regard to withdrawals or resignations from the union. Did this practice develop as the result of joint discussions by the company and the union?

A. It evolved around a practice contractual in the contract. All during the fifties, where we had a yearly contract.

Q. You previously identified General Counsel's 28, as a

document that went to two individuals, I believe, with regard to what to tell employees in 1965?

A. Yes.

Q. Was any general description of that document posted on the bulletin board or was it handed along out to employees, or anything like that?

A. Absolutely not. This has been a practice of the Boeing Company for the twenty years I have been with them. Under no condition do we ever encourage membership or nonmembership in a labor organization.

Q. Now, 1965, probably another in other years, too, but in regard to 1965, the contract negotiations were handled in Seattle, is that correct?

[107] A. That's correct.

Q. In 1965 the strike was—the strike was restricted to the Michoud or the southern division?

A. It wasn't restricted at all. In fact, I think at that particular time we had Boeing employees at some 35 different states who we had bargaining people in all 35. I can't say. But it was not restricted to any other area in the United States.

Q. Would it cover the entire unit described in general Counsel's No. 7, 1963 to '65 contract?

A. It did.

* * *

[108] Q. (By Mr. Stout) Now, Mr. Nau, after the dispute was filed in the First District Court by the IAM against Mr. Conniff, did he have any discussion with you concerning this suit?

A. When the litigation was filed, I was contacted by Mr. Conniff. I am of the impression that it was more than one; two or three. But I was contacted by Mr. Conniff regarding his receiving his information from the District Court.

Q. What if anything did you tell him?

A. I informed Mr. Conniff that if he cared to use the law firm that the company used, that he could contact at that time Mr. Bernie Marcus, or if he cared to use his own attorney, he had that privilege.

Q. All right, sir.

* * *

[109] CROSS EXAMINATION

* * *

Q. Well, I agree with that. Isn't it a fact that the company has agreed to defend these suits for the employees?

A. The company has agreed to use their law firm to defend the employees if the employees so desire. This is correct.

• • •

[112] Q. All right now, you mentioned that the earlier contract, the contract that was in effect prior to the year 1963, and a provision in it for an employee to withdraw his union membership; is that correct?

A. In the fifties, we had yearly contracts, the PF&A provision in it.

Q. That an employee could by a registered letter to the union and another to the company terminate his union membership?

A. This is correct.

Q. I show you General Counsel's Exhibit No. 7, the contract in effect just prior to the strike, and ask you if any such provision is contained in that contract (presenting document)?

A. There is no provision in this contract.

Q. Now, in other words, the union had negotiated out any agreement they had with the company that an employee would be permitted to terminate his membership in the union?

A. During the life of any agreement, this is correct.

Q. During the life of any agreement?

A. Yes.

Q. All right. So when you speak of past agreements or past practices, you are referring to the former written agreement?

[113] A. I referred to the former written agreements only to reveal where this procedure and when it started as far as the Union and the Company how they handled the cancellation of membership.

Q. You are not trying to tell us or the Trial Examiner, are you, that during the life of this agreement that went into effect in 1963 that the Union had agreed with the Company that a man could terminate the membership by sending a written notice to the union?

A. No, I am not, not at all, no.

Q. All right. So that the information you are putting out in this letter here to your inferiors and to your men who

operate under you refer to the past practice that had been contained in contracts.

A. Not entirely. It contained the past practice that was used during the period of no contract.

Q. You say used by the Company, is that correct?

A. And not agreed to by the Union.

Q. When you say not agreed to by the Union, do you mean that the Union cancelled those people's membership, if you know?

A. This is correct.

Q. Now, in your role as labor relations, you are familiar with the difference between cancelling Union membership and cancelling Union authorization for deductions, are you not?

[114] A. I am.

Q. Now, are you—you recognize that an employee has a right when a contract has been terminated to cancel his union authorization, Union deduction authorization under the law?

A. Right.

Q. Or he has the right to do this during an escape period once each year?

A. He has the right to do it during the life of the contract too.

Q. During the yearly escape period?

A. No, anytime unless it has an irrevocable clause.

Q. By contract.

A. With the Union.

Q. With the Union, all right. His cancellation of the authorization does not permit him to cancel his union membership.

A. Not during the life of the agreement.

Q. All right, now, with respect to this contract that was in effect or terminated at the time of the strike, I will ask you if in his agreement there is any provision that an employee can terminate his Union membership or his check-off of dues simply by addressing a letter to the Union and to the Company? I will direct your attention to Article 3 and the sub-section thereunder beginning on Page Number 13 of the contract.

[115] A. To answer your question in two parts, number one—there is nothing in the contract that indicates whether a person can or cannot cancel his payroll deduction for

union dues during the life of this agreement, however, it has been the practice of the company that, unless there is an irrevocable clause in the payroll authorization card, that an employee has the right to cancel his payroll authorization card any time he so desires by informing the company in writing that he wishes to cancel it.

As to your second question, this contract states that as a condition of continued employment for a person, a member of the union, he must maintain his membership during the life of this agreement or any renewal thereof, so if there is a renewal of the agreement, then he must continue his membership in the union as a condition of employment. If there is no renewal and the contract is terminated, as in the case of 1965, then the practice is—

Q. There is no provision in the contract, is there, that an employee has no reference, whatsoever, as to his terminating his union membership by a written notice to his—

A. During the life of the new agreement.

Q. During or without the agreement, there is no mention, whatsoever, in the contract that he might terminate his union membership?

A. Not to my knowledge, that's right.

[116] Q. I see. You knew, did you not, when you issued these instructions to the man under you, that in the event of a renewed contract, an employee might be required to renew his union membership?

A. I agree, I did.

Q. Despite that, you put out this notice that a man may, who wishes to terminate his membership in the union, may send a registered or certified letter to the union and to the company in Seattle.

A. I did on the basis that it—it was the overwhelming opinion of most people in the plant, number one, there would be a strike. Therefore, the question started to be asked as to, in the event of a strike, what do I do if I want to withdraw my membership from the union and cancel my payroll authorization for the union dues? In order not to, again, permit any encouragement of this, I wanted to make sure our people were aware of what had happened in the past, what the company's policy was, regarding union membership.

Q. You intended that this notice and the information on it, should be communicated to the employees in the plant?

A. No. I intended that the personnel representatives who the employees would contact or their supervisors would contact in the event an employee wanted to talk to somebody in the company regarding the withdrawing of their membership in the union, that they knew what the company policy was and what the individual [117] should do in accordance with past practice because—but this was not as I answered before, something put on the bulletin board and communicated to all their troops. This is the way to get out of the union, this was not the intent, nor, did that occur, to my knowledge.

Q. Nevertheless, I don't see where you, in any way, advised them on what the union's regulations were about terminating the membership. Were you aware of the union's constitution?

A. All I was aware of is indicated in that memorandum, is, as to what occurred in previous years during a no-contract period and what the union's position had been in previous years during a no contract period.

Q. When you speak of previous years, where were you located in previous years?

A. Here at the Michoud Plant.

Q. You mean to say in 1964, at the Michoud Plant, employees terminated their membership?

A. '64 or '62.

Q. When was it?

A. '62 to '63 during the negotiations for the contract that was in effect from—actually, from October or from September 15, 1962 until September 15, 1965. The Taft-Hartly Act had been invoked. There was—but all during this period of time, from September '62 until sometime in May, there were actually, three periods of twenty-four hours, or more, in which and in [118] which their legal technically, contract—actually, there was no contract between the International Association of Machinists and the Boeing Company during those three periods, here, and the Seattle people withdrew their membership from the International Association of Machinists by sending a registered letter to 751 and the Boeing Company, indicating their desire to terminate their membership and cancel their payroll deduction for union dues and the payroll deductions for union dues were canceled.

Q. Did you have a picket line at the plant, during that period of time?

A. We did not—wait, sir—we did have a picket line, I think, for one or two days at the Cape, that's the only area, I think.

Q. You had none in the New Orleans, Area?

A. None.

Q. Any period in '62?

A. No.

Q. In '62, isn't it true, that the previous contract had provided that an employee could cancel his union membership?

A. No.

Q. The contract in 1960 had not so provided?

A. The contract in 1960 did not provide for an escape period other than a no-contract period.

Q. Now, Mr. Nau, with reference to your—before I leave [119] this subject—Do you know whether or not the information on this memorandum, General Counsel's 28, was communicated by your supervisors to the employees who requested information as to how to get out of the union?

A. I—Any supervisor who called me on this subject, I requested that the supervisor send the employee to me, because I wanted to, again, in my efforts to make sure there wasn't any encouragement as far as withdrawal from union membership, make sure the employees received this information. It is very possible, I gather, from the testimony this morning, it occurred that a supervisor could have answered this question to the employee rather than sending the employee to the Personnel Department or Labor Relations Office.

Q. How many people were sent to Personnel?

A. I don't have any idea as to the number of people that went to Personnel, nor, do I have any figures as to how many people went to my office in Labor Relations.

Q. Did any of them come to your office in Labor Relations?

A. I am—in looking back—I am going to say there were a number of people that came to my office. Want to use a figure of twenty-five or fifty or seventy-five—I can't give you any figure.

Q. Did you advise them, in accordance with this letter, that the proper procedure was to send a registered or certified letter to the union and Company, stating they wished to terminate this [120] membership in the union?

A. I advised them in accordance with that memorandum.

Q. Did you assist them in writing the letters by making a personal—

A. I did not. These letters were written by the individuals themselves and sent by the individuals.

Q. Many of the letters in the file that have been offered in evidence as General Counsel's Exhibit No. 24, seem to follow a specific pattern of language. Did you help to compose those letters?

A. No, I merely indicated to the individuals that—when asked—what they should put in the letter, that as, again, in previous years, the employees merely state they wished to cancel their membership in the union, terminate their membership in the union.

Q. In the letter from Louis H. Staub, Jr., I read the lines:

> "Inasmuchas the International Association of Machinists no longer has a contract with the Boeing Company, I wish to take this period of election to resign my membership in the International Association of Machinists, Lodge No. 405."

Do you recall whether you talked to Mr. Staub?

A. No. My memory would say that is rather a lengthy letter. I think the majority of the letters just indicated that they wished to terminate their membership in the union and cancel [121] their payroll authorization for union dues deductions.

Q. Was that shorter form recommended by you?

A. I merely indicated, I didn't recommend any form, there were two points that were customarily put in such letters.

Q. I notice in a number of other letters, carrying the same language as Mr. Staub's—For instance, a letter from Mr. Harry D. Fye and the letter of Joseph W. Cary and another of Francis King and still another one signed by Henry Ennis, Jr. all carrying the same language, but as you recall, you had nothing to do with the origin of that language?

A. Nothing, nothing, nothing whatsoever.

Q. All right.

A. I don't know any of those individuals, either.

* * *

[123] Q. All right. Thank you.

As I understand it, Mr. Nau, this General Counsel's Exhibit No. 9, the list that you received from the secretary

of the union, Gene Griffith, that list was made up at your request?

A. That is correct. In previous years, the union did send one. This was a new Local down here, and so, at my request, [125] I informed Mr. Griffith of this and indicated to him that this would be the best way to expidite the overall bookkeeping.

Q. This was after the strike, was it not?

A. That is correct.

Q. Dated November 4, 1965?

A. This was after the new contract went into effect. We were endeavoring to get all the letters together.

Q. Then, your purpose in seeking this information from Gene I beg your pardon—Gene Griffith, seeking this information from Gene Griffith, was to correct your records as to dues deductions?

A. Not entirely. My reason for giving this letter was to have an up-to date list that both the company and the union agreed to, employees of the company that were members of the union. Under the old contract had terminated their membership during a period of no contract. We canceled their payroll deductions so their names were off the books so all records are up-to-date and their records are up-to-date. I want our payroll records up-to date, also, so I requested for him to send me a list of the names that the union's records indicate terminated their membership in the union.

Q. He did not indicate to you that it was not the intention of the union to try these men or otherwise discipline them for their action in crossing the picket line?

A. No, no. Just indicated to me those people terminated in [126] membership in the union?

Q. You didn't indicate whether these requests had been recognized or accepted by the union, did you?

A. No. He indicated to me—in that letter—they had been accepted by the union.

Q. Which way did he indicate?

A. The letter indicates, if I recall correctly, the union received—terminating their membership in the union.

Q. These were the ones who wrote the certified letters terminating their membership in the union?

A. There was no indication on the part of Mr. Griffith that the procedure had been followed in previous years by

the union would not continue to be followed in this period of no-contract 1965, none whatsoever.

Q. Did you specifically ask him whether these people had been permitted to terminate their employment and cross the picket line, under the circumstances?

A. I can't say that, I did or did not, all I can say is, this was implied in our conversation on the both parts. There was no indication that this was not the case.

• • •

[127] Q. Isn't it a fact, Mr. Nau, just tell us, if you don't mind, tell us honestly, you solicited this list and this letter to reenforce this position of those strike breakers of the picket line, sent letters terminating membership on the authority and advice of the information that you had put out in General Counsel's 28. Didn't you ask for this letter to protect those people?

A. I did not and I may say that, at the same time, in fact, again, that this was the practice and was accepted by the International Association of Machinists Lodge and from the experience I have had with the company, prior to 1965 I again repeat, I was merely trying to make sure that we got out our bookkeeping up-to-date so that we didn't go through a series of months having problems getting union books up-to-date, as far as payroll deductions is concerned. We went through this problem in '62 and '63.

Q. There hasn't been a strike at the New Orleans Plant since when?

A. Only one strike, 1965, but I repeat there were three periods in 1962 and 1963 of no contract.

Q. All right. Then you have records of people who terminated their memberships during this period of time?

A. During the period of time, 1962 to 1963, the provision of this particular contract, the provisions were applicable to other [128] areas as well as the Michoud area. There were many people who terminated their membership and cancelled their payroll authorizations for union dues in the Seattle Area, during these periods of no-contract. I remember one case here in Michoud where the person sent a letter in and his payroll deductions were stopped and no further action was taken as far as demanding his termination or that he wasn't a member of the union. He was considered as withdrawing his membership from the union.

Q. Do you remember his name?

A. No, I don't remember his name.

• • •

[129] Q. Why was it necessary for you to get this information from Mr. Griffith if as the contract provides the employee must send a written notice to the company before he—his dues deductions are stopped?

A. The reason I requested it is the fact that letters were sent to 751 in Seattle and the Corporate Labor Relations Office in Seattle, and there was a, I don't know how many—hundreds, hundreds of such letters of such letters were received by both of those offices in Seattle during this period of no contract. We had those letters out authorized, to get the letters down to me and get the information down to me, as far as, those people assigned to the Michoud Plant and to get that information from 751 to their Local in two weeks and authorized to expedite this information, to make sure that we were communicating and to get the records up-to-date. This was the easiest approach that I felt could be done and this was the approach we had used in previous years, at which—where the union would actually bring out there, their list and go over it with the company list so—Mr. Griffith, at this time, having come from Wichita, whether he knew that particular procedure or not, I can't speak for him on that subject, but this is the [130] manner in which we had done it for years to expedite the records.

• • •

[131] Q. If you don't mind, would you tell me the union has requested that any of those employees who resigned or expected to resign, terminate their membership, has the union requested that any of their employment be terminated?

A. To my knowledge, they requested all of them be terminated. Mr. Higgins sent me a letter, I think it was sometime in January 1963 indicating that these people had five more days, I think, to get their dues up-to-date with the union, or that they should be terminated under the existing union-company agreement.

Q. Was this letter ever followed up?

A. By whom?

Q. By the union?

A. Oh, yes. They asked me what I was going to do with it.

Q. Did you ever do anything?
A. I did not.

• • •

[132] REDIRECT EXAMINATION

Q. (By Mr. Stout) Mr. Nau, you told Mr. Barker that the company agreed employees—the company agreed to help in the defense of these suits by the IAM, civil suits, was that decision communicated to the employees, to your knowledge, at Michoud?
A. Agreed to what?
Q. Pay attorneys' fees in connection with civil suits.
A. In—to my knowledge, it was not.

• • •

HAROLD HIGGINS

was called as a witness by and on behalf of General Counsel and having been duly sworn was examined and testified on his oath as follows:

DIRECT EXAMINATION

• • •

Q. Now, Mr. Higgins, did you hold a position with Boosters Lodge 405 at the time of the strike in '65?
A. Business Representative.
Q. When were you elected Business Representative?
A. June 19—took office June 1964.
Q. How long did you serve in that poistion?
A. Until November 1965.

MR. JOHNSTON: I would like to question the witness under 43(b).
TRIAL EXAMINER: Is there any objection?
MR. BARKER: No, your Honor, he will tell the truth under any section of the Act.

Q. (By Mr. Johnston) Mr. Higgins, did you have anything to do with setting up the hearings and all for the employees to be fined for working behind the picket lines?
A. Assited the Secretary in the performance of the duties, Bill Irvy.

• • •

Q. Who was the president?
[134] A. Roger Hilton.

Q. Just briefly, for the record, the employees who did not appear at the trial, they were fined in what amount?

A. They set up the amount, the membership, for $450.00.

Q. Also denied the right to hold office for five years, as I recall?

A. This is true.

Q. Now, the people who did appear in the hearing that was the amount of their fine, $450.00?

A. $450.00.

Q. Then, the membership voted to suspend that if they would pay fifty percent of what they earned during the strike?

A. This is true.

Q. At the time of the strike, what was the amount of the initiation fee into the union, do you recall?

A. To the best of my knowledge, $10.00 initiation fee and first months dues.

Q. How much were the monthly dues?

A. Monthly dues, at that time, I believe, was five-fifty.

* * *

Q. Did you have an occasion to see some withdrawal letters that were sent to the union's office by District Local 751 in Seattle?

A. I was shown a number of them, yes, sir. Seen a number of them.

Q. Do you know what happened to those letters?

[135] A. No, sir, I don't know how many they were. I don't know, but I saw some.

Q. Do you know when they were received from Seattle?

A. No, sometime in September 15—October 15, I imagine, I don't know.

Q. Do you have—Did you have occasion to see letters sent directly to Boosters Lodge 405, withdrawal letters?

A. Seen a few, yes, sir.

Q. Did you ever make any reply to these letters?

A. Personally?

Q. Yes.

A. To my knowledge the Financial Secretary would reply to these letters. If I made any reply, I would have a recollection of it.

Q. Do you know whether the union made any reply to any of these resignation letters?

A. To an individual?

Q. Yes, to an individual.

A. No, not to my knowledge.

Q. Did you ever advise an employee that his resignation letter to 751 wouldn't have been any good?

A. Not to my knowledge.

Q. As a matter of fact, what was the union's position at that time concerning how an employee could go about resigning from the union?

[136] A. As far as the union's concerned, under our constitution, there is a—he couldn't resign by letter. The only way a man might resign from the International Association of Machinists, was by being in arrears—honorary withdrawal card—become three months in arrear in dues or be suspended by the Local, itself or by the International.

Q. These—

A. Or by death.

Q. These conditions are set out in your constitution and by-laws?

A. In the constitution of the IAM.

Q. You said an honorary withdrawal, how do you go about getting honorary withdrawal?

A. Anyone who leaves the trade, this is a trade—under the description of the contract of the IAMW for anyone who accepts a position above the title of working foreman, may go ahead and put an application in for an honorary withdrawal card, voted for by the members—either accepted or rejected, by the membership.

Q. It was the union's position, at the time of the strike none of these employees had a right to resign from the union?

A. That is correct.

Q. Did you ever advise employees of that fact?

A. No, not by letter.

Q. Sir, did you in any way advise them?

[137] A. I've always taken the position a number of times in groups—

TRIAL EXAMINER: Even a withdrawal card, it is a sort of inactive membership, isn't it?

THE WITNESS: That is true, that is true.

• • •

Q. Let me rephrase that. The employees fined $450.00, the membership voted to let them, instead of paying that,

either [138] pay that amount of half of what they earned, what they made of—while working for the company during the strike, is that right?

A. Under certain stipulation, yes, sir.

Q. Were any reductions made, other than on that basis?

A. None, that I know of.

Q. During—Did you participate in any of these trials?

A. Yes, sir.

Q. Was anything raised during the trials, concerning the effects of the employees caused by the hurricane in their ability to pay these fines?

A. Only, I believe, one person, I believe I can recall a Mr. Thomas that raised a question of inability because of the hurricane.

Q. Only one employee?

A. That I know of personally.

Q. Were many members of your union that were working at Boeing affected by the hurricane?

A. Yes, sir.

Q. Affected by the hurricane, that is, losing their homes and things like that?

A. Yes, sir.

Q. Was the hurricane taken into consideration in levying the amount of the fines?

A. Yes, sir.

[139] Q. To what extent?

• • •

A. I personally feel the fine should have been higher, I think, personally, but due to the fact that since we don't have the company records, there is a strong possibility that the man made a lot more than $450.00, that would indicate he should pay the full amount he earned. This was my personal viewpoint, sir, nothing to do with the union.

TRIAL EXAMINER: This strike wasn't very long, was it, Mr. Higgins?

THE WITNESS: No, sir. 19 days. Some of these people worked continuously all nineteen days.

TRIAL EXAMINER: Did they get double time?

THE WITNESS: Yes, sir.

Q. (By Mr. Johnston) This question about double time, you are talking now, as provided in the contract, isn't that right?

A. Yes, sir.

Q. In other words, not double time every day they worked?

A. No, sir.

• • •

[140] MR. JOHNSTON: Counsel for the parties have stipulated that a document marked General Counsel's Exhibit 30, a copy of a form letter sent to employees who were fined, dated September 10, 1968.

TRIAL EXAMINER: All right. It will be received.

• • •

[142] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Fifteenth Region

In the Matter of: BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AND THE BOEING COMPANY	Case No. 15-CB-779

Room T-6009
Federal Building
701 Loyola Avenue
New Orleans, Louisiana
Thursday, October 3, 1968

Pursuant to adjournment; that above-entitled matter came on for further hearing at 9:30 o'clock a.m.

• • •

[145] HARRY KATZ

Was called as a witness by and on behalf of General Counsel, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

• • •

Q. Were you employed by the Boeing Company at the Michoud Plant at the time the strike occurred in September, 1965?

A. Yes.

Q. Were you a member of the Booster's Lodge 405, at the time?

A. Yes, I was.

Q. Did you make any effort to resign from the union during the strike?

A. Yes, I did.

• • •

Q. At the time—would you tell the court what action you took?

A. When the strike was called I was out for a few days and when I felt that I wanted to go back to work, I decided to [146] resign from the union and then I went back to work after I had resigned.

Q. What did you do as far as resigning? How did you go about that?

A. Sent a letter to the Union in Seattle, I believe it was and sent another letter to the Company.

Q. How did you send these letters?

A. Sent both certified mail.

Q. Did you request return receipt on them?

A. Yes, sir, I did.

Q. Did you receive the return receipt back?

A. Yes.

Q. Did you keep a copy of the letter you sent to the Union and to the Company?

A. Yes, I did.

Q. I show you some documents marked for identification as General Counsel's Exhibit 31, 31(a) and 31(b) and General Counsel's Exhibit 32, 32(a) and 32(b) and ask you if these are the letters with the return receipts and receipt certificate for certified mail that you testified about?

A. Yes, these are the letters.

[147] Q. What I mean is, the day you went to work in relation to the time you sent these letters?

A. After I had sent the letters. It wasn't the same day.

Q. Did you later receive notification you had been fined by the Union?

A. Yes, I did.

Q. Did you later receive notification that legal action had been taken against you?

A. Yes.

Q. Do you recall the amount of the fine?

A. $450.

Q. Did you receive a notification the fine had been rescinded or anything?

A. No.

* * *

CROSS EXAMINATION

[148] Q. (By Mr. Barker) Mr. Katz, how did long did you stay out after the strike started?

A. I am not positive but I think it was about four days.

Q. At the time the strike started were you a member in good standing of Local No. 405? Of the International Association of Machinists and Aerospace Workers.

A. As far as I know I was.

Q. Your dues were being checked off by the Company?

A. Yes.

Q. Did you—had you signed an application to become a member of that organization?

A. Yes. After I became employed by Boeing I signed the application.

Q. When were you employed?

A. In May, 1963.

Q. Yes, and did you understand the application when you signed it?

A. I understood that I was joining the union. I don't recall the exact terms of it, no.

Q. Now, who was it that informed you you could get out of the union by sending a letter—certified letter—to the union?

A. Well, this was the topic of discussion during the strike. When we were out for a few days, a little grouping outside the plant and I found out then that we could do this—or at least we discussed it, anyway.

[149] Q. No union official told you?

A. No.

* * * *

Q. Now, to whom did you send your letter?

The letters will speak for themselves.

I withdraw that.

After you returned to work, were you sent a notice by the union you would be tried for violation of the Constitution?

A. I received several letters from the Union. I think one of them said I was violating their laws—or rules. I don't [150] remember what the first letter was.

Q. Let me show it to you and ask you if you ever received that?

Excuse me—I show you what has been identified by agreement as General Counsel's Exhibit 10 (presenting document) and ask you to take a look at that letter and I ask you if you received an identical letter except that it was addressed to you and contained a different time and date for your trial?

A. I think I did get one like this.

Q. All right. Now, after—did you show up for your trial?

A. No, I didn't. The reason I didn't show up was I had sent in my letter of resignation and felt that I had no further dealings with the union.

Q. All right. Afterwards, after the date of the trial, did you receive another letter identical with General Counsel's Exhibit 12 here?

A. I recall a letter similar to this.

Q. Advising you you had been fined $450? Is that right?

A. Yes, sir.

Q. Now, after being notified of the amount of your fine, what effort did you make to have the fine reduced?

A. I made none.

Q. Did you contact the union in any way?

A. No, I didn't.

* * *

[151] Q. Did you learn, Mr. Katz, that some of those who had been fined, upon contacting the union that the fine was reduced to 50% of the amount earned during the time of the strike?

A. I didn't know of any specific case. Just heard of all kinds of rumors about that being reduced 50% of the earnings, when they worked behind the picket line. Some people but I had no particular knowledge of any case where this happened.

Q. When you heard these rumors did you make any inquiries of the union?

A. No, I didn't.

Q. And you haven't attended any union meetings since?

A. No, I haven't.

Q. Did you attend the meeting in which the strike vote was taken just prior to the commencement of the strike?

A. The one that was held in the hall, Jackson Avenue Maritime Hall?

Q. Yes.

A. Yes, I did.

* * *

[152] HAROLD HIGGINS

was called as witness by and on behalf of Respondent, and having been perviously sworn, testified further as follows:

DIRECT EXAMINATION

• • •

[153] Q. I see. Now, what was the strike over, Mr. Higgins?

A. Economics, contract.

Q. Yes, and the contract had expired around the 15th of September, 1965?

A. Midnight of the 15th.

Q. Now, at that time, I will ask you if the members who appear, the individuals who appear on this list, General Counsel's Exhibit No. 16 (presents document), which is a list of fines and on Page 4 of that Exhibit a payment of fines and Page 5, a list of those who were found Not Guilty or Mistrial—I will ask you tell us whether or not those individuals were members of Booster Lodge 405 at the time the strike started?

A. I can answer that in this way. They were not members—they had not been members they would not have been tried—to my knowledge, they were members.

Q. Had each of them signed an application for membership in the organization?

A. That is one of the requirements to become a member of the Machinists.

• • •

[158] Q. (By Mr. Barker) Mr. Higgins, is there any provision by which a member can resign by simply sending a certified letter or a registered letter to the organization?

A. No, sir.

Q. All right.

Are the provisions you have previously testified about with respect to termination of membership, all contained in the Constitution, General Counsel's Exhibit 5?

A. Yes, sir.

Q. Are there any by-laws or practices of the local permitting them—permitting members to resign from membership?

A. None I am aware of, sir.

• • •

[159] Now, Mr. Johnston, as I understand it, the General Counsel, makes no contention about the irregularity of the notice or the trial as to the individuals who were fined.

MR. JOHNSTON: No, not the trial. We are not contending that is an issue in this case.

MR. BARKER: Well, I will stipulate that the trial procedure was proper and each of the individuals on the list received notice of trial. We have stipulated about the letter already. It may be covered in the record. So far we have already stipulated that the letter, General Counsel's Exhibit No. 10, was a form letter that was sent to all of the individuals on the list as General Counsel's Exhibit 16.

[160] MR. JOHNSTON: Yes. We will stipulate to that as long as the record is clear we are—our position is, you have no right to fine the persons who resigned at all, but as far as the procedure involved in giving them notice and all, we are not raising that as an issue.

MR. STOUT: I think the record already reflects I am not joining in the stipulation.

Q. (By Mr. Barker) Mr. Higgins, were all of those sent notices of the trial? Were they all handled in the same fashion?

A. To my knowledge, everyone was handled the same.

Q. How were the fines handled by the trial committee and how was the amount fixed?

A. The amount was fixed, primarily, by the membership as suggested and the trial committee would show no partiality to any individual, set a standard fine.

Q. That fine was as shown on the list? $450?

A. This is correct, sir.

Q. Were all the individuals on this exhibit, General Counsel's 16, generally—subsequently notified of the amount of their fine?

A. Everyone was notified the amount of their fine, to the best of my knowledge.

Q. All right.

Now, after the fine was fixed at $450, what, if any, [161] action did the Local take with respect to reducing the amount of the fine?

A. I can only speak as of two years—what action was taken between the end of the strike and up to two years ago, on this particular phase of it. The membership did take a vote and made a recommendation. A motion was made and passed at a membership meeting that anyone who showed remorse toward crossing the picket line—rejoined the machinists—their fines would be reduced to half.

Q. You can only speak as of two years ago. When was this action taken by the Local?

A. This action was taken, I believe in the first part of '66. The motion was passed—I mean, what I refer to, Counsel, any action taken after two years ago to change this motion, I am not aware of it.

Q. As far as you know, this motion is still in force and effect?

A. As far as I know, yes.

Q. Now, pursuant to that, let me ask you, sir, on specific individuals had the Local acted prior to 1966 in reducing the fines of individuals?

A. The Local did act on individual cases on the recommendations of the trial committee.

Q. Now, I direct your attention to Page 4, General Counsel's Exhibit 16, which apparently shows the names of individuals [162] with a notation after it, 50%, followed by the amount collected. Were those persons acted on individuals or by the general motion of the membership?

A. Well, each one would have to be by general membership vote on each individual person.

Q. And were those fines reduced to amount shown on that list?

A. To the best of my knowledge, yes, sir.

Q. Were those individuals originally fined $450?

A. Yes, sir.

* * *

Q. Under what circumstances were the fines reduced?

A. Those people appeared before the trial committee and before the membership, in a lot of cases, said they were sincerely sorry about crossing the picket line. They wanted to become good members again, therefore, the trial committee, under these circumstances, trying to be fair with everyone, attempted to relieve the burden of the economics and they made the recommendation, the trial committee, to the membership.

Q. How was the specific amount of the fine arrived at?

A. Well, actually, we have no company records as to how many days they worked or anything. We have to take individuals' words as to how many days he worked behind the picket line and his hourly rate at that time.

[163] Q. In other words, whatever the man stated. How

many days he worked and how much he had earned, the Local accepted 50% of that amount?

A. This was correct.

Q. The amount accepted from those individuals is reflected on the set of sheets, page 4 of General Counsel's 16?

A. I would say—I would assume these figures are correct, yes, sir.

Q. What does—what does P.I.F. indicate?

A. According to the testimony by the General Counsel yesterday, Paid In Full.

Q. What is the individuals' particular hardship as a result of the hurricane or other factors? Was this taken into consideration in fixing the ultimate amount he was allowed to pay?

A. Yes, sir, this was taken into consideration.

TRIAL EXAMINER: How was it taken into consideration, Mr. Higgins? I understand it was either $450 or 50% of what he earned during the strike?

THE WITNESS: Well, this is correct. There was the fine $450. Every individual member who crossed the picket line. We, had no records of the company as to how many days they worked behind the line, sir. We set a figure which we felt they worked—all 19 days—which would be considerably less than what they earned behind the lines. Then, when a [164] person did come in and show they wanted to rejoin—was willing to go ahead and pay half of what they earned behind the lines, there was no pressure put on as to when they were going to pay this. Next week, next month, six months. No economic pressure put on as a deadline as to when they were going to pay it:

Q. (By Mr. Barker) But the Trial Examiner wants to know how you arrived at your consideration of the hardship in fixing the final amount of the fine?

A. Well, actually, you are saying on each individual?

Q. Yes.

A. We set a standard practice of individuals. In other words, the membership decided that we had people in the hurricane who were wiped out that walked the picket lines. We had these people to take into consideration. We also realized people in hardship during the hurricane. This is why 50% of the pay taken earned behind the lines. It was taken into consideration.

Q. What did the—was there investigation or contest of those statements?

A. No, sir, not to my knowledge there wasn't.

Q. In other words, the Local accepted whatever figure he gave them and figured the fine at half that amount?

A. Yes, sir.

Q. Did the Local ever take any action to permit withdrawal [165] from membership of any of the individuals who sent letters out of Local 405? Also resignations to 405 or 751 during the strike?

A. No, sir.

Q. I believe you have already explained when you were on the stand before as to how a man withdraws his membership in the organization. Now, these members that were fined, were they continued on the rolls as members?

A. They were continued on our rolls as per se, sir, up until, of course, their dues became three months in arrears.

Q. Have all of those that were fined paid their fines?

A. No, sir. Have they all paid their fines?

Q. Yes.

A. No, sir, to my knowledge.

* * *

Q. Did you have a conversation around the time of the strike or after the trials with Mr. John Nau about the fines?

A. Yes, sir.

Q. What was the nature of that conversation?

A. Basically trying to get me to encourage the membership to drop the fines. Not try the people that crossed the picket [166] lines, basically. He felt it was illegal, I think.

* * *

CROSS EXAMINATION

Q. (By Mr. Johnston) Mr. Higgins, we covered some of this yesterday but in view of the questions asked—the people who did not appear at the trial were fined $450? Is that correct?

A. Yes, sir.

Q. Also, denied the right to hold office for five years, is that correct?

A. Pardon me, sir. The people who did appear and were found guilty, the membership fined the people who appeared and were found guilty.

Q. Right.

A. Yes, sir.

Q. To your knowledge, were any of those fines ever reduced?

A. To my knowledge, yes, sir. Some of the people who were fined $450—if I am not mistaken—did come in later, I think. I think I recall one, a Mr. James came in and asked for a reduction and it was reduced.

Q. Yes. Were they ever notified if, after they had been fined if they came in the amount might be reduced?

A. Not by letter, sir, but it was the general conversation. It was brought up with the membership in the minutes, to my knowledge.

[167] Q. You never notified by letter, to your knowledge?

A. No, sir.

Q. Now, you testified the hurricane was taken into consideration. Was it your testimony that the consideration was that the fine, instead of $450, would be reduced to half of what they earned during the strike?

A. The consideration given because of the hurricane?

Q. Yes.

A. This was part of the consideration. Sort of actual wages earned, half of what they earned, yes, sir.

Q. Half of what they earned during the strike?

A. Yes, sir.

Q. This was the extent of the consideration given because of the hurricane? Is that correct?

A. No, sir.

Q. What other consideration was given?

A. Not pressure on the time limit as to payment of these fines.

Q. Any other consideration given, other than that?

A. I don't know of any. At the time I can't recall any.

Q. I see.

Now, the fines were all $450? That amount was that fixed prior to the time the trial started, or did each individual industrial board determine the amount or what?

A. Well, sure, this was—sir, the requirements—the recom [168] mendations made to the trial committees by the officers of the Local.

Q. Prior to the time the trial started?

A. If they were found guilty prior to the time the trial started, that there should be no partiality shown. The guilt was equal. Each individual.

Q. And the amount fixed at $450 if found guilty?
A. Yes, sir.

• • •

[169] Q. (By Mr. Stout) You identified some exhibits Mr. Barker showed you a moment ago, purported to be membership applications for Lodge No. 405, the employees who were already members of the union in 1964, before Local Lodge 405 had its own memberships applications, did they sign new applications when 405 obtained these cards?
A. It wasn't necessary, sir.
Q. Their applications had been in 751?
A. This is correct. That's right, sir. Transferred to our Local.
Q. Do you recall prior to October, 1965, 405 or 751 levied any fines against any of the Michoud employees?
A. I am sorry I didn't get that.
Q. Prior to the strike, 1965, did 405 or 751 levy—ever levy any fines against any of the members of Michoud?
A. I cannot speak for 751. I can speak for 405 on that basis. [170] To my knowledge, no, prior to the strike of '65.

• • •

[170] REDIRECT EXAMINATION

• • •

[171] Q. One question I neglected to ask you.
Was the policy of—was it the policy of the organization with regard to giving a new member a copy of the Constitution or would you state whether or not the Constitution was available to the members.
[172] A. The Constitution and the contract, at that time, was furnished by the Union. Each one was available to every member who signed up.

• • •

RECROSS EXAMINATION

• • •

Q. Now, can you tell me when these employees who had been fined, [173] when they had been notified that there was no hurry for payment or anything and could pay it like they wanted to?
A. We stated that there was no pressure put on them, sir.
Q. When did you tell them there would be no pressure put on them in paying their fines?

A. The ones that claimed hardship at the trial, to the best of my knowledge, we recommended that to the officers, the trial committee and the officers did accept it.

Q. Were they informed?

A. In letters?

Q. Yes.

A. No, sir, not to my knowledge. I don't know.

Q. As far as you know, they were not—never were told individually either they could pay as they wanted to or something like that?

A. That's to the best of my knowledge, they were told this, "no pressure" as far as the amount, they could pay it as they wished, a month or whatever would be more convenient. This was my best recollection.

• • •

[174] Q. You mentioned the Constitution was available to these people. In what way?

A. We always have them in the office, sir. A lot of times the stewards have them. The stewards bring them to them if requested.

Q. These application forms that Mr. Barker had you identify earlier, the applicant retains a copy of this form?

A. No, sir.

• • •

Q. All right. Do you recall at the time of the period we are talking about, 1965, Local Lodge 405 published a house organ called the "Space Traveller"?

A. Yes, sir, a paper sent to the membership. Yes, sir.

Q. Let me show you what I have marked as Charging Party's Exhibit No. 1—I withdraw the question. We have a stipulation. Charging Party's Exhibit No. 1 is the October 13, 1965 issue of the "Space Traveller" issued by Local Lodge 405 and I offer [175] it as Charging Party's No. 1 at this time.

TRIAL EXAMINER: All right.

What particular part do you wish to call to my attention, Mr. Stout, in this?

MR. STOUT: Your Honor, two sections. One is on Page 3, I believe, entitled "Hurricane Betsy", and then on Pages 3 and 4 was a list of names under the heading in capital letters, "We Shall Not Forget".

TRIAL EXAMINER: Hearing no objections, they are received.

• • •

HAROLD HIGGINS-FURTHER REDIRECT

[176] TRIAL EXAMINER: Mr. Higgins, were there any employees during the strike who sent in termination or alleged termination of membership but still did not work during the strike?

THE WITNESS: To my knowledge, yes, sir. I know of one in particular.

TRIAL EXAMINER: Now, was that individual fined?

THE WITNESS: No, sir.

TRIAL EXAMINER: The reason I asked you that is because upon reading this Charging Party's Exhibit 1 and on the last page, after it has a list of people, it says, "If your name was on this list in error, come to the Union office and upon presentation of proof that you did not work by crossing the picket line or you did not ask for termination from the union, and we will publish the correction." We understand some of the members listed above who voted for termination of membership have since signed an application for reinstate [177] ment." What I am trying to clear up, you did not work by crossing the picket line or you did not ask for termination from the union?

THE WITNESS: Well, sir, I am sure we had assisted—the company records—we would have tried quite a few more people than what we had. We didn't recognize—I believe it was understandable, those people who we did not have definite information about were not charged, to my knowledge. There was a couple found not guilty, so the only thing we had left to go on was the resignation letters or the attempt to resign. This is why the differential in the "Space Traveller".

TRIAL EXAMINER: On the people you know that worked during the strike, you had no problem about them? You knew they worked?

THE WITNESS: Yes.

TRIAL EXAMINER: There were some others, apparently, that you had termination letters from. Is that correct?

THE WITNESS: This is correct, sir.

TRIAL EXAMINER: But you had no other information as to whether or not they worked during the strike?

THE WITNESS: This is right, sir, to the best of my knowledge.

TRIAL EXAMINER: Did you consider them as having worked during the strike and fined them?

THE WITNESS: No, sir, we did not because we had no [178] proof—not charged—to my knowledge. They had to be a member to be charged by another member that could prove he worked behind the lines.

• • •

MR. BARKER: If there is any doubt in the Trial Examiner's mind where, were these men charged for having sent in a termination letter or charged for having crossed the picket line, the men who sent in resignations and we had no proof of them crossing the picket line, nothing was done except publish their name in the "Space Traveller", to my knowledge, showing the members who desired to resign from the union. No economic action was brought against them or trial.

TRIAL EXAMINER: In other words, you are saying only those tried were those that crossed the picket lines?

MR. BARKER: That we had knowledge of, yes, sir.

MR. STOUT: That is including some of those who did send in termination letters.

MR. BARKER: Oh, yes.

• • •

[179] MR. BARKER: We will offer by stipulation Charging Party's Exhibit 2 and 3 and Respondent's Exhibit No. 7.

MR. STOUT: Charging Party's Exhibit No. 2 is a letter dated December 10, 1965 to Mr. Nau from Mr. Higgins and Charging Party's 3 is a letter from Mr. Nau to Mr. Higgins, a letter dated January 6, 1966 with attachments.

• • •

TRIAL EXAMINER: All right. They will be received pursuant to stipulation.

• • •

MR. BARKER: I have one or two questions. I have one or two questions of the witness about Charging Party's Exhibits.

TRIAL EXAMINER: All right.

Whereupon,

HAROLD HIGGINS

resumed the stand, and testified further as follows:

DIRECT EXAMINATION

Q. (By Mr. Barker) Mr. Higgins, I will show you the Charging Party's Exhibits 2 and 3 and Respondent's Exhibit 2, which contains a list of approximately 13 members who apparently are [180] no longer members of the Booster Lodge No. 405. Under what circumstances was their membership terminated?

A. By being in arrears three months, to the best of my recollection.

Q. Now, I show you Charging Party's Exhibit 3, which has an attached list of members and I direct your attention to the fact that this is dated January 6, 1966. Under what circumstances was the membership of these individuals, named on the attached list, terminated?

A. I would say for the same reason. Their dues had become three months in arrears.

* * *

ROBERT THOMAS

was called as a witness by and on behalf of Respondent, and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

[181] Q. How long have you been employed at Boeing?

A. Four years and nine months.

Q. Are you a member of Booster Lodge 405?

A. That is correct.

Q. How long have you been a member?

A. Four years and seven months.

Q. Four years and seven months, and were you a member during the strike of 1965?

A. That is correct.

Q. And would you tell the Examiner whether or not you attempted to resign from the Local?

A. I did.

Q. How did you do that?

A. By writing the Company one letter and the Union Lodge another one.

Q. From whom did you get the information about how to write the letters?

A. This information was obtained by me—by my own ability due to the fact that when I was hired by the Boeing Company I was informed in orientation I would have to write the Company [182] and the Union a registered letter if I so desired not to join the Union, therefore, I assumed from this I would have to do the same procedure if I desired to resign from the Union.

Q. All right.

Now, did you work during the strike?

A. I did.

Q. After you sent your letter in?

A. No, before.

Q. Before. Were you notified of the charges brought against you?

A. Yes, I was.

Q. Were you fined?

A. Yes, I was.

Q. How much were you fined?

A. At the specific time I was told the fine would be $450.

Q. Did you appear at your trial?

A. I did.

Q. Yes, and what was your plea at the trial?

A. My plea was "guilty".

Q. Did you explain the circumstances under which you had to go to work?

A. I did.

Q. What were those?

A. The results came as this; that it was other people who had suffered the same conditions that I had and that the mem [183] bership of the union had decided that it would be not lenient as to matters as to the extent of what had occurred to each individual and that the union had called a strike, therefore, we was bound by that order from the union and had no right to cross the picket line under no conditions. I was so told that there was people who may had lost everything they possessed as well as me.

Q. What was your difficulty at the time? What had happened to you in the hurricane?

A. I lived in the area between Chef Monteur Highway and Dwyer Road. Some 30 inches of water in my house. Lifetime possessions I had accomplished was completely

destroyed, therefore, me and my wife and eight children were sleeping on the floor at my uncle's apartment. He had eight children and only two bedrooms. Fourteen people living in this particular house at the time of the strike.

• • •

[189] Q. Your original fine was 50% of what you earned?

A. 50% of what I earned or $450, depending upon whether or not I showed interest and loyalty to the union.

• • •

Q. (By Mr. Barker) 50% of what you earned back of the line?

A. That is correct.

[190] DONALD C. VERIGAN

a witness called by and on behalf of Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

• • •

Q. What position, if any, do you hold with Booster Lodge 405?

A. I am President.

Q. How long have you held this position?

A. Since approximately June, 1966.

Q. Since June of 1966?

A. Correct. This is approximately. November of 1966.

• • •

[192] Q. (By Mr. Barker) What about the policy of the union as to how to compute for the payment of fines, the 50% of the amount earned behind the picket line?

A. Well, since this happened in 1965, some people come in talking about their fines. They ask—we ask them how long they worked. They don't remember, naturally, so we compute it an average that would be paid and arrived at $40. This is the average fine that has been paid if they couldn't remember how long they worked behind the line. We have had no way of knowing, ourselves, from the record, so we accepted this as an average fine and discussed it with them.

Q. Has this privilege of paying $40 been extended to all of those fined, whether they appeared at trial or not?

A. These were basically those who asked for clemency,

appeared before their own trial or appearing before the membership subsequent to their trial. There have been a few who have come back in and wanted to join the union and those—this was established to them, also. They would pay a $10 reinstatement fee and pay their $40 fine. It was explained to them at the time how we arrived at the $40 fine.

[193] Q. Now, how about the individual, M. C. James?

A. M. C. James appeared before the membership and asked for leniency. He said he made a mistake. That he shouldn't have crossed the picket line. Asked for clemency. The decision of the membership was that he should pay half of what he earned behind the lines and this amount—I don't recall exactly the amount. It is written down, I noted, on the exhibit, and this [194] is 50% of what he earned.

Q. M. C. James, this is the same individual that is listed on page 2 of the exhibit?

A. A Muncie J. James.

Q. And that is who you are speaking of?

A. Right.

[196] REDIRECT EXAMINATION

Q. (By Mr. Barker) Has the Local ever disputed the figure given by the individual as to the amount he earned during the strike?

[197] A. No. The only time we would even suggest an amount was if the person doesn't know how many days he worked. Then his would be the average fine. That's where that comes in.

Q. That is the average fine of $40?

A. Right. Right.

* * *

MR. STOUT: The Charging Party has nothing. I might make a brief statement.

In connection with Charging Party's Exhibit 1 I overlooked—failed to state, we also called to His Honor's attention on Page 1 an article entitled, "The Strike Is Over" and signed by Harold Higgins, Jr. I had failed to mention it in answer to Mr. Donovan's question earlier and I meant to.

We have nothing further.

Mr. BARKER: I agree with this. Are you referring to the portion—the 10% of the work behind the lines, commonly called scabs must have a guilty conscience to accept the gains [198] won by others?

MR. STOUT: That in connection with, "We Will Not Forget," yes.

• • •

TRIAL EXAMINER: On the record.

As I understand the complaint, Mr. Johnston, you allege that the levying of these fines in the sum of $450 on all the people you have named was illegal because the fines were unreasonably excessive and—

MR. JOHNSTON: With the exception of employees named and other employees. It goes beyond those merely named in the Complaint.

TRIAL EXAMINER: All right. But regardless of resignations or anything else, this is a general allegation, that the levying of the fines itself was illegal?

MR. JOHNSTON: Right. $450 fine, that is correct.

TRIAL EXAMINER: Then do you, in effect, say that moreover, in effect, that there were certain people who resigned and that as to them there is an additional vulnerability on the union's part, to have fined those people?

MR. JOHNSTON: That is correct. Regardless of the amount of the fine in those cases.

MR. BARKER: The levying of any fine.

MR. JOHNSTON: Prior to crossing the picket line the [199] employees resigned from the union; that we have other employees—

TRIAL EXAMINER: Now, now. I daresay you will have covered this in your briefs. Just so I am—I will have a little to be thinking about, what, in the Act, do you base the terms unreasonable, excessive and discriminatory and equate that with illegality?

MR. JOHNSTON: Nothing specifically in the Act. Not defined in the Act. We contend to fine them in that amount would be unreasonable. We would argue certain factors in here would make it unreasonable and discriminatory.

[G.C. EX. 4(C)]

DODD, HIRSCH, BARKER AND MEUNIER, ATTY.

CITATION

FIRST CITY COURT OF THE CITY OF NEW ORLEANS
STATE OF LOUISIANA

NO. 94-203 SECTION DOCKET #3

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, BOOSTER LODGE #405

VS.

J. T. CONIFF

TO: J. T. CONIFF—6519 St. Rich St.

YOU ARE HEREBY CITED to either comply with the demand contained in the petition of which certified copy accompanies this citation, or make an appearance, either by filing a pleading or otherwise, in The First City Court of The City of New Orleans, State of Louisiana, the address of which is The Civil Courts Building, 421 Loyola Avenue, New Orleans, Louisiana, within five days (exclusive of legal holidays) after the service hereof under penalty of default.

Witness the Honorables A. J. O'KEEFE, JR., S. SANFORD LEVY, DOMINIC C. GRIESHABER, MARION G. SEEBER, Judges of the said Court.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of The First City Court of The City of New Orleans, State of Louisiana, this 11th day of April in the year of our Lord 1966

NAT GROS, Clerk of The
First City Court of the
City of New Orleans, State of Louisiana

by B. LAYACANO
Deputy Clerk

Clerk's Office, Room 201, Civil Courts Building
421 Loyola Avenue, New Orleans, Louisiana

CONSTABLE'S RETURN:

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, BOOSTER LODGE #405	No. 94-203
vs.	First City Court
J. T. CONIFF	City of New Orleans
Filed:	State of Louisiana
	.....
	Deputy Clerk

PETITION FOR MONEY JUDGMENT

The petition of Booster Lodge #405 of the International Association of Machinists and Aerospace Workers, an unincorporated labor organization, domiciled in Orleans Parish, Louisiana, appearing herein through its president, Harold E. Higgins, Jr., respectfully represents that:

1.

J. T. Coniff is domiciled in the Parish of Orleans, State of Louisiana and is indebted unto your petitioner in the amount of Six Hundred Thirty and no/100 ($630.00) Dollars, with legal interest from date of judicial demand for the following:

2.

J. T. Coniff, defendant, at all pertinent times a member of the plaintiff labor union, was duly tried by plaintiff union for violation of the plaintiff's Constitution, at a hearing on November 18, 1965, by a special committee set up pursuant to the said Constitution; was found guilty as charged and fined $450.00.

3.

J. T. Coniff, defendant was duly notified of the findings and of the fine and was given ample time to pay said fine but had failed to do so.

4.

No appeal was taken from the finding and the penalty imposed, which, according to the Union's Constitution, are now final and executory.

5.

According to the Constitution of the Union, defendant owes, in addition to the fine itself, reasonable attorney fees incurred by the Union in this suit to collect the fine, which the Union avers to be 40% of the amount sued upon, or $180.00.

WHEREFORE, plaintiff prays that there be judgment herein in favor of petitioner, International Association of Machinists and Aerospace Workers, Booster Lodge #405, and against J. T. Coniff in the amount of Six Hundred Thirty and no/100 ($630.00) Dollars, with legal interest from date of judicial demand until paid and for all costs of these proceedings.

DODD, HIRSCH, BARKER & MEUNIER,

/s/ Thomas J. Meunier
By: THOMAS J. MEUNIER
711 Carondeler Building
New Orleans, Louisiana 70180
522-7265
Attorney for Plaintiff

Please serve J. T. Coniff,
2545 Madrid Street, Apt. 209
New Orleans, Louisiana

CONSTITUTION

of the

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

Effective January 1, 1965

* * *

ABBREVIATIONS

The following abbreviations, when used in this Constitution, have these meanings, viz:

A.F.L.C.I.O.	American Federation of Labor and Congress of Industrial Organizations
Art.	Article
C.L.C.	Canadian Labour Congress
D.L.	District Lodge
E.C.	Executive Council
F.S.	Financial Secretary
G.L.	Grand Lodge of The International Association of Machinists and Aerospace Workers
G.L.A.	Grand Lodge Auditor
G.L.R.	Grand Lodge Representative
G.S.T.	General Secretary-Treasurer
G.V.P.	General Vice President
I.A.M.A.W.	International Association of Machinists and Aerospace Workers
I.P.	International President
L.L.	Local Lodge
R.S.	Recording Secretary
S.T.	Secretary-Treasurer
Sec.	Section

ARTICLE XVIII

STRIKES

Approval of Strike

SEC. 1. In an extreme emergency, such as a reduction in wages, or an increase in the hours of labor, where delay would seriously jeopardize the welfare of members in-

volved, the I.P. may authorize a strike pending the submission to and securing the approval of the E.C. In all other cases the grievances must be submitted to the E.C. and its approval obtained before any strike may be declared by an L.L. or the members therof; and any L.L. or members thereof failing to comply with the provisions of this Art. shall forfeit all rights to strike benefits or other financial aid from the G.L. during the entire period of the controversy.

Method of Declaring Strike

SEC. 2. Whenever a controversy arises over conditions of employment between members and their employers, the L.L. having the greatest number of members involved shall call a meeting of all members directly affected to decide by secret ballot upon a course of action. A majority of those present and voting on the question shall decide.

If a strike vote is to be taken, such vote shall be by secret ballot. In order to declare a strike, such vote must carry by a three-fourths majority of those present and qualified to vote.

Where groups of shops are classified under the jurisdiction of one L.L. and when demands for the establishment and maintenance of uniform conditions in such classified groups of shops have been formulated and adopted by constitutional action of the L.L., then all the qualified members of the L.L. employed in such a classified group of shops, shall be entitled to vote on strike action affecting any particular shop in that classified group. Only members of more than 6 months shall be entitled to vote on the question of declaring a strike. The decision of the L.L. or L.Ls. shall be transmitted to the employer or employers by the authorized representatives of the members involved. If the members involved are unable to reach an agreement, the R.S. shall prepare a full statement and history of the matters in controversy and forward the same to the I.P., who shall thereupon in person or by deputy visit the L.L. where the controversy exists and, with a member of the L.L. whose members are involved, investigate the controversy and if possible effect a settlement.

Upon receipt of the statement and history of the matters in controversy from the R.S., the I.P. shall prepare and forward a copy thereof to each member of the E.C., together

with a request for their vote on the question of approving a strike. Upon receipt of the vote of the E.C., the I.P. shall forthwith notify the L.L. of the decision of the E.C. No strike shall be declared by any L.L. or the members thereof without first obtaining the consent of the I.P. or the E.C.

Should any L.L. fail to receive the sanction of the E.C., it shall hold a meeting and declare the grievance at an end. Continuing such grievance after failure to secure the sanction of the E.C. shall be considered sufficient cause for the suspension of any L.L. and the members thereof from all rights and privileges, at the option of the E.C.

Handling of Forms and Reports

Sec. 3. Where agreements covering members of our Association are through the D.L., all forms and reports required pursuant to this Art. may be signed by the officers of the D.L. involved, in order to expedite the handling and processing of the necessary forms and reports by the E.C. and I.P.

Declaring Off a Strike

Sec. 4. A proposal to settle or declare off an existing strike must be presented at a regular or called meeting of a L.L., or a meeting of the members affected (as the case may be), and decided by majority vote, by secret ballot, of the members involved. Whenever the E.C. declares that it is unwise to continue an existing strike, it may order all members who have ceased work in connection therewith to resume work, and thereupon and thereafter all strike benefits shall cease, except that the I.P., with the consent of the E.C., may continue the relief in special deserving cases.

Handling Unfair Work

Sec. 5. Whenever members have ceased work on account of a grievance approved by the E.C., and the employer is having work done in other places of employment, whether owned or controlled by such employer or not, members employed in such other places of employment may be ordered by the L.L. or by the D.L., if one exists in that locality, to cease doing such work or to cease working at such places. All such orders are subject to approval by the E.C. before members complying therewith are entitled to strike or vic-

timized benefits, as the case may be. In the event the members refuse to cease work as herein described, the I.P., with the approval of the E.C., may order said members to cease work until the dispute is satisfactorily adjusted, or until ordered to return to work by the E.C.

Strike Fund

Strike and Victimization Benefits

Sec. 6. Fifty cents of each month's per capita tax transmitted to the G.L. shall be allocated to a strike fund; said fund shall not be used for any other purpose except as specified herein. Benefits shall be paid from this strike fund in accordance with the provisions:

When $2,500,000 have accumulated in the strike fund, members in continuous good standing for at least 6 months who have ceased work on account of a grievance approved by the E.C., or who have been victimized and have satisfied the E.C. that by reason of this discrimination they are unable to secure employment, shall receive benefits in the amount of $25.00 per week from the fund.

No benefits shall be paid unless the strike or victimization extends over a period of more than 2 weeks. Thereafter, benefit payments shall commence with the beginning of the 3rd week.

Members on strike or victimized, but not at the time entitled to benefits because of lacking the 6 months' membership required herein, shall be entitled to receive benefits as soon as they have been in good standing for 6 months.

Payment of benefits from this strike fund shall be discontinued whenever the balance in the fund is reduced to a level of $500,000, in which event the E.C. shall authorize the payment of strike donations out of the General Fund in accordance with the organization's laws and policies and as provided for in Sec. 4, Art. V of this Constitution. Strike benefit payments shall not be resumed from the strike fund until it again accumulates $2,500,000.

The payment of strike benefits or strike donations as provided for in this Sec. shall be denied or terminated whenever members on strike, who during the strike become gainfully employed, are earning in excess of $25.00 per week.

Whenever strike sanction is granted, the L.L. and/or D.L.

will be notified of the number of members eligible to receive benefits and the amount of weekly benefits that will be paid.

As the occasion requires, the G.S.T. will advise the L.Ls. and D.Ls. of the financial condition of the strike fund and, whenever possible, shall project the probable strike benefit amount to be paid at least 4 weeks in advance.

Method of Payment

SEC. 7. Whenever a strike has been ordered or approved by the G.L., each member affected shall sign the strike record semi-weekly. From the names appearing on the strike record the secretary of the L.L. shall make up a roll showing the names of the members on strike or who may be victimized.

After the roll has been approved by the signatures of the president, F.S. or S.T., and R.S. of the L.L., it shall be forwarded to the G.S.T., who, after examination, shall return the same, together with a check or checks, as the case may be, of the G.L. covering the amount of any benefits paid, which check or checks shall be drawn payable to the individual member properly entitled to such benefits, or at the option of the G.S.T.'s office, a blanket check made payable to the president, F.S. or S.T., and R.S. of the L.L.

Each member receiving a benefit from the G.L. must receipt for same upon the duplicate roll provided, after which the secretary shall return one copy of said roll to the G.S.T. for the files of the G.L., and place one copy on the L.L. files. Except in cases where the distance and time required for the transportation of the mails makes the rule impracticable, the G.S.T. shall not forward a check covering subsequent benefits before the receipted roll for the previous week has been received by him. No claim for any benefits under the provisions of this Sec. shall be considered or allowed unless presented to the G.S.T. within 30 days from the date on which said benefits were due.

No benefits shall be paid to members who refuse to do the duties assigned to them by those in charge of the strike.

Deduction for Arrearages

SEC. 8. Whenever a member claiming strike or victimized benefits is in arrears for dues or assessments, the G.S.T.

may deduct from such benefits an amount sufficient to pay all such arrearages.

Strike Stamps

SEC. 9. Members who have ceased work on account of a grievance approved by the E.C. are entitled to receive strike stamps free of cost, covering the period during which they are without employment, upon complying with the provisions of Sec. 3, Art. G, and conforming to such other requirements as may be instituted for the good and welfare of those involved by the L.L. of which they are members.

ARTICLE F

SPECIAL LEVIES

Failure to Pay Special Levies and Fines

SEC. 1. Fines or other levies within the authority of a L.L. to make shall be due within 30 days after levied. If not paid within that time the F.S. or S.T. shall notify those in arrears in writing, and should they fail to make payment within 60 days from the date of such written notice, their membership shall be cancelled regardless of the date to which their dues are paid.

L.Ls., pursuant to Sec. 1, Art. D, may through their by-laws adopt a provision to levy fines upon members who fail to attend at least one L.L. meeting per month.

Initiation fees, reinstatement fees, dues and fines shall constitute a legal liability by a member to the L.L. Cost of litigation arising from charges against a member by reason of such liabilities shall constitute a legal debt and payable by such member.

* * *

Honorary Withdrawal Cards

SEC. 18. Any member who leaves the trade because of illness, or obtains employfent outside the trade or industry, or obtains a supervisory position above the rank of working foreman, or because of circumstances over which the member has no control is compelled, as a condition of employment, to join another labor organization, or enters the Armed Forces of the United States or Canada, and upon complying with the conditions hereinafter set forth, may be

issued an honorary withdrawal card by and with the approval of the L.L. in which membership is held.

Application for withdrawal card, accompanied by a fee of 25¢, shall be made to the F.S. or S.T. of the L.L. who, after the application has been approved by the L.L., shall issue same, bearing the L.L. seal on a form designed and supplied by the G.L.

No application will be granted until all fines, dues and special levies charged agianst the member have been paid in full to date of application.

Persons discontinuing their membership by accepting withdrawal cards will not be entitled to any benefits or permitted to attend meetings or participate in any of the business of the I.A.M.A.W.; however, those persons who enter the Armed Forces of the United States or Canada will receive credit for time spent in such service toward Veteran Badges should they resume membership in the I.A.M.A.W. upon their discharge. They shall not violate any of the laws or decisions of the G.L. or L.L. under penalty of having their withdrawal cards cancelled.

* * *

Improper Conduct of a Member

SEC. 3. The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing as hereinafter provided:

Circulating or causing in any manner to be circulated any false or malicious statement reflecting upon the private or public conduct, or falsely or maliciously attacking the character, impugning the motives, or questioning the integrity of any member or officer.

Refusal or failure to perform any duty or obligation imposed by this Constitution; the established policies of the I.A.M.A.W.; the valid decisions and directives of any officer or officers thereof; or, the valid decisions of the E.C. or the G.L. convention.

Attempting, inaugurating, or encouraging secession from the I.A.M.A.W., or advocating or encouraging or attempting to inaugurate any dual labor movement, or advocating or encouraging communism, fascism, nazism, or any other

totalitarian philosophy, or by other actions giving support to those "philosophies" or "isms" or to movements or organizations inimical to the I.A.M.A.W. or its established policies and laws.

Acquiring membership by false pretense, misrepresentation, or fraud.

Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission.

Actions constituting a violation of the provisions of this Constitution.

Illegal voting or in any way preventing an honest election to fill elective offices, posts or positions in the G.L. or any L.L., D.L., council or conference.

Any other conduct unbecoming a member of the I.A.M.A.W., provided, however, that any charge of such conduct shall specifically set forth the act or acts or omissions alleged to constitute such offense.

* * *

Trial of a Member

SEC. 7. Charges preferred against a member for other than a violation of his or her duty or duties as an officer or representative of either a L.L. or D.L. shall be governed by the following procedures:

It is the duty of any member who has information as to conduct of a member covered by Sec. 3 of this Art. to immediately prefer charges in writing against such member by filing the same with the president of the L.L. of which the accused is a member. The president of the L.L. with whom the charges are filed shall supply a copy to the accused and forthwith proceed to bring the accused to trial under the provisions of Secs. 8 through 13 of this Art., except that the I.P. may, when he deems such action necessary in order to provide a fair trial or to protect the best interests of the I.A.M.A.W., direct that the accused be tried either by a special committee designated for that purpose or by the G.L. convention. In the event the latter procedure is adopted, the trial of the charges shall be governed by the provisions of Sec. 5 of this Art.

In the event the president or the president and other officers of the L.L. are involved in the charges filed, the next ranking officer shall preside, as herein set forth. In the ap-

plication of this Sec. the order of ranking of officers shall be president and vice president. In the event a president and vice president are involved in the charges, or are absent, the R.S. shall call for nomination of a temporary chairman and the members present shall immediately proceed to select a temporary chairman by majority vote. The temporary chairman selected shall then proceed to carry out the requirements of this Sec.

In the event that any L.L., or the members thereof, fail to proceed as prescribed herein, then any officer or representative, or member, may file written charges against such member or members with the I.P. Upon the receipt of such charges, the I.P. shall forward one copy thereof to the accused and one copy thereof to the president of the L.L. of which the accused is a member, together with a order commanding said L.L. to proceed to place the accused on trial under the provisions of this Art.

If said L.L. fails or refuses for 15 days thereafter, to proceed as ordered by the I.P., then the I.P. shall notify the accused and the L.L. of which the accused is a member, of the time and place, when and where a special committee will meet for the purpose of hearing evidence and trying the accused upon charges theretofore preferred, provided, however, that the I.P. or the E.C. may, if they deem advisable, in lieu of a trial before a special committee, order the accused to be tried by the G.L. convention. In the event the latter procedure is adopted, the trial of the charges shall be governed by the provisions of Sec. 5 of this Art.

Appointment of Trial Committee

Sec. 8. Except as otherwise provided in this Art., whenever charges have been preferred against a member, the president of the L.L. shall promptly appoint a trial committee of not more than 5 members, one of whom shall act as chairman and one of whom shall act as secretary. The trial committee shall conduct an investigation of the charges and decide whether there is sufficient substance to warrant a trial hearing being held. If the trial committee decides a trial hearing is warranted, the committee shall, within one week of its appointment, notify the member of the charges against him and when and where to appear for trial. The time set for trial shall allow the accused a reasonable time

(not less than 7 calendar days after notification) to prepare his defense.

If the trial committee decides the charges should be dismissed on the basis of lack of supporting evidence, it will so recommend to the next regular meeting of the L.L. and the L.L. shall adopt or reject the trial committee's recommendation. If the L.L. adopts the recommendation, the charges shall stand dismissed subject to appeal of L.L. decisions as provided in Sec. 14 of this Art. If the L.L. rejects the committee's recommendation, the trial committee shall proceed to notify the charged member and hold a trial hearing.

Appearance

SEC. 9. If a member fails to appear for trial when notified to do so, the trial shall proceed as though the member were in fact present.

Evidence

SEC. 10. Both the plaintiff and the defendant shall have the privilege of presenting evidence and being represented either in person or by attorney (the attorney being a member of the I.A.M.A.W.). The trial committee shall maintain a written record of the trial proceedings, including all testimony and documents introduced by either the plaintiff or or the defendant.

Trial Procedure

SEC. 11. 1. Call trial committee to order.

2. Examine due books.
3. Clear the trial chamber of all people except the trial committee, the trial reporter (who need not be a member of the I.A.M.A.W.), the plaintiff and his attorney, the defendant and his attorney, and representatives of the G.L., if in attendance.
4. The plaintiff and the defendant shall remain in the trial chamber until trial is concluded, but shall sit apart.
5. The chairman shall read the charges and ask the defendant if he is "guilty" or "not guilty." If the

plea is "not guilty" the trial shall then proceed; if the plea is "guilty" the trial committee shall conduct such further proceedings as in its judgment are required.

6. The plaintiff or his attorney shall present his case first.
7. Witnesses shall be called into the trial chamber one at a time, and will leave the trial chamber upon completing their testimony, subject to recall by either the trial committee, the plaintiff, the defendant, or the representatives of the G.L.
8. All persons giving testimony shall be required to affirm that the testimony that they give shall be the truth.
9. Defendant and his attorney shall have the right to cross-examine plaintiff's witnesses.
10. Defendants witnesses shall then be called.
11. Plaintiff and his attorney shall have the right to cross-examine the defendant's witnesses.
12. Following the completion of cross-examination, the plaintiff and defendant shall be given the opportunity to make a statement or summation of their case, with the plaintiff having the first and last opportunity for remarks.
13. Before the trial committee shall begin its deliberations upon the testimony given, all persons except the trial committee shall leave the trial chamber.

Report of Trial Committee

SEC. 12. The trial committee shall consider all of the evidence in the case and thereafter agree upon its verdict of "guilty" or "not guilty." If the verdict be that of "guilty," the trial committee shall then consider and agree upon its recommendation of punishment.

Following completion of these deliberations and conclusions, the trial committee shall report at the next regular meeting of the L.L. The plaintiff and the defendant shall be promptly notified in writing by the R.S. of the decision of the L.L. with respect to the guilt or innocence of the defendant and with respect to the penalty imposed if the L.L.

took action on the latter; the trial committee's report shall be in two parts as follows:

1. The report shall contain a synopsis of the evidence and testimony presented by both sides together with the findings and verdict of the trial committee.

   After the trial committee has made the necessary explanation of its intent and meaning, the trial committee's verdict with respect to guilt or innocence of the defendant shall be submitted without debate to a vote by secret ballot of the members of the L.L. in attendance.
2. If the L.L. concurs with a "guilty" verdict of the trial committee, the recommendation of the committee as to the penalty to be imposed shall be submitted in a separate report to the L.L. and voted on by secret ballot of the members then in attendance.

Voting on Report

SEC. 13. The penalty recommended by the trial committee may be amended, rejected, or another punishment substituted therefor, by a majority vote of those voting on the question, except that it shall require a two-thirds vote of those voting to expel the defendant from membership.

If the L.L. reverses a "not guilty" verdict of the trial committee, the punishment to be imposed shall be decided by the L.L. by a majority vote of those voting on the question, except that it shall require a two-thirds vote of those voting to expel the defendant from membership.

Disqualification from holding office as a penalty for misconduct as a member or officer shall be limited to 5 years, except as otherwise provided in Sec. 6, Art. XXIV and Sec. 3, Art. B.

Appeal from Decision of L.L. or D.L.

SEC. 14. An appeal may be taken to the I.P. from the decision of a L.L. or D.L. by either the accused or the party preferring charges against the accused within 30 days after the verdict. Such appeal must be addressed to the I.P. in writing and set forth in specific detail the grounds on which it is based. The appeal may also include any argument in support thereof which the appellant desires to advance, but

shall not include any new evidence. The I.P. shall transmit to the opposing party a copy of the appeal and such party shall have a period of 15 days to reply thereto. The I.P. shall obtain from the L.L. or D.L. a complete record of the trial before the L.L. or D.L. and shall make a decision based on such record, which shall be final and binding unless changed on further appeal as hereinafter provided. The decision of the I.P. shall contain his findings and conclusions and the penalty, if any, to be imposed. Upon such an appeal the I.P. shall have full authority to affirm or to modify or reverse, in whole or in part, the decision of the L.L. or D.L., or to remand the proceedings for further trial before the L.L. or D.L., or to impose any penalty or fine which he deems to be required, including expulsion. No party to the appeal shall have a right to appear in person before the I.P. However, the I.P., if he deems it necessary or desirable, in connection with his consideration of the appeal, may accord such a privilege. The I.P. shall furnish a copy of his decision to each party to the appeal by registered or certified mail.

Appeal from Decision of I.P.

Sec. 15. An appeal may be taken from a decision of the I.P. to the E.C. by any interested party to the proceedings before either the I.P., the L.L. or D.L. Such appeal must be taken within 30 days from the date of the I.P.'s decision and shall be made in writing to the G.S.T. The appeal shall set forth in specific detail the grounds therefor and may include any written argument in support of these grounds. The G.S.T. shall also notify the opposing party in charge cases or trial cases of any appeal from the decision of the I.P. to the E.C. and shall furnish such party with a copy thereof. The opposing party shall have a period of 15 days in which to file any written argument in opposition to the appeal with the G.S.T. The G.S.T. shall transmit to the E.C. such appeal and any written arguments in opposition thereto, together with the record of the proceedings before the I.P., and the decision of the E.C. shall be made upon this record and the arguments submitted in connection there with. No party to the appeal shall have a right to appear in person before the E.C. However, the E.C., if it deems it necessary or desirable in connection with its consideration

of the appeal, may accord such a privilege. The decision of the E.C. shall be by majority vote of those participating and shall be final unless changed upon further appeal as hereunder provided. No member of the E.C. involved in the case or who has participated in the matter at earlier stages shall be entitled to participate in the decision on appeal. The E.C. shall have full authority to affirm or to modify or reverse, in whole or in part, the decision of the I.P. or to remand the proceedings for further trial before the L.L. or D.L. or to impose any penalty or fine which it deems to be required. The G.S.T. shall furnish a copy of the decision of the E.C. to each party to the appeal by registered or certified mail.

Appeal from Decision of E.C.

SEC. 16. An appeal may be made from a decision of the E.C. by any party to the proceedings before the E.C. to the G.L. convention, or to the membership at large by submission thereof to the referendum as provided in Art. XX. Such appeal shall be made in writing to the G.S.T. within 90 days from the date of the E.C.'s decision and shall set forth in specific detail the grounds therefor. The appeal may include a written argument in support of such grounds. The G.S.T. shall notify the E.C. and the opposing party of such appeal and furnish them with a copy thereof. Such party may, within 15 days, file with the G.S.T. a written argument in opposition to the appeal. The appeal shall be referred to the Appeals and Grievance Committee of the convention, and the G.S.T. shall transmit to such committee the record of the proceedings before the lower tribunals of the I.A.M.A.W. as well as the arguments of the appellant and of the opposition party. The Appeals and Grievance Committee shall, upon timely request, hear both parties to the appeal in person. However, no party to the appeal shall have a right to appear in person before the convention. The Appeals and Grievance Committee shall make a written recommendation to the convention based upon the record before it, which shall contain its findings, conclusions, and recommendations as to penalty to be imposed, if any. The convention may amend or reject in whole or in part the findings and recommendations of the Appeals and Grievance Committee and find the accused either "guilty" or "not

guilty." The convention may also accept or reject in whole or in part any recommendation of the Appeals and Grievance Committee with respect to a penalty to be imposed, and may itself provide a substitute penalty by a majority of delegates voting on the question. Such action of the convention shall be recognized and accepted as final and binding on all parties.

Before any appeal can be taken from an E.C. decision, the decision and all orders of the E.C. in relation thereto must be complied with by all parties concerned therein; provided, however, that in the event the E.C. concludes that compliance pending appeal would constitute a substantial bar to the exercise of the right thereof, compliance therewith may be waived or modified by the E.C. with respect thereto.

No officer, member, representative, L.L., D.L., or other subordinate body of the I.A.M.A.W. shall resort to any court of law or equity or other civil authority for the purpose of securing an opinion or decision in connection with any alleged grievance or wrong arising within the I.A.M.A.W. or any of its subordinate bodies until such party shall have first exhausted all remedies by appeal or otherwise provided in this Constitution not inconsistent with applicable law for the settlement and disposition of such alleged rights, grievances or wrongs. The I.P., E.C., and G.L. convention are hereby empowered to refuse or defer consideration, or to refuse or defer or withhold decisions, in any matter pending in any court of law or before any other civil authority as circumstances in their judgment may warrant and justify.

* * *

BYLAWS

BOOSTER LODGE 405

INTERNATIONAL ASSOCIATION OF MERCHANTS

* * *

Section 7.2 The approval of a strike, method of declaring a strike, and the settlement of a strike shall be in accordance with applicable provisions of the IAM Constitution.

Section 15.1 Nothing in these Bylaws shall be construed or applied in a manner that will conflict with the provisions of the IAM Constitution. All matters arising and not specifically covered in these Bylaws shall be governed by the IAM Constitution.

COLLECTIVE BARGAINING AGREEMENT

Dated May 16, 1963

Between

THE BOEING COMPANY

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

CERTAIN DISTRICT AND LOCAL LODGES THEREOF

• • •

AGREEMENT

THIS AGREEMENT, dated this 16th day of May, 1963, by and between The Boeing Company, a Delaware corporation (the term "the Company" being hereinafter deemed in each instance to refer to such corporation) and the International Association of Machinists, A.F.L.-C.I.O., and those of its lodges now and hereafter representing employees of the Company (the term "the Union" being hereinafter deemed in each instance to refer to the International Association of Machinists, A.F.L.-C.I.O. and to each such district or local lodge in reference respectively to the collective bargaining unit with which it is identified and the employees therein);

WITNESSETH that

WHEREAS, the parties have negotiated the terms and conditions of a collective bargaining agreement (hereinafter referred to as the "Agreement"), relating to employees of the Company represented by the Union and more particularly described in this Agreement and to the wages, hours and other terms and conditions of employment of such employees, and the parties desire to reduce the Agreement to writing; and whereas the terms "Primary Location" and "Remote Location," as used in this Agreement and the appendices hereto respectively shall have the following meanings: "Primary Location" shall refer to a major base of Company operations designated by the Company as a Primary Location such as "Seattle-Renton," "Wichita," or "Atlantic Missile Test Section." "Remote Location" shall refer to a Company operation located in an area away

from a Primary Location and designated by the Company as a Remote Location, such as Michoud Plant, Vandenberg Air Force Base, Plant 77 (Ogden, Utah), Eglin Field, a Company operation at a military or governmental base, etc.

Now, THEREFORE, in consideration of the mutual promises hereinafter set forth, the parties hereto agree as follows:

ARTICLE I.

UNION REPRESENTATION

Section A.

The Company recognizes the Union as the exclusive collective bargaining agent for all employees covered by this Agreement, as follows:

1. Seattle-Renton Unit

Those employees in the collective bargaining unit that was involved in National Labor Relations Board Case No. 19-RC-344, and now consisting of:

a. all production and maintenance employees of the Company in the State of Washington, who are not on temporary assignment from a Primary Location other than Seattle-Renton, and,

b. all production and maintenance employees of the Company outside the State of Washington who are at Remote Locations identified with the Seattle-Renton Primary Location in accordance with Section C of this Article,

but excluding, as to employees within and without the State of Washington: staff nurses; employees working in the receiving and testing departments performing chemical or electrical laboratory work; stenographers A and B working for foremen, general foremen, inspection supervisors, production supervisors, and chief timekeepers; production engineers in the Production Planning Department and the Experimental Production Department working under the job titles of Senior Production Engineer B, Production Engineer A, Production Engineer B, Production Planner Special and Production Planner B; the following employees in Departments 521 and 525: production control record-

ers, working group leaders, clerks, expeditors stenographers, and operators of tabulating, key punch, and verifier machines; power plant operators; truck drivers operating on the public highway; office clerical employees; guards; professional employees, and supervisors as defined in the Labor-Management Relations Act of 1947; and subject to any further exclusions to the extent required by other certifications, orders or rulings of the NLRB, and

further excluding those classifications, organizations and functions which have superseded those mentioned in the foregoing exclusions.

Instructors and group leaders assigned as instructors over such production and maintenance employees are under the scope of the Union's jurisdiction.

Such unit is primarily identified with the Primary Location known as Seattle-Renton and with Aeronautical Industrial District Lodge No. 751 (IAM, AFL-CIO).

* * *

ARTICLE III

UNION SECURITY

AND

UNION REPRESENTATIVES ON COMPANY PREMISES

Section A. Union Security.

The terms and conditions of this Agreement in regard to Union Security (Union membership as a required condition of employment) are as follows:

1. Employees of the Company that are within the bargaining unit defined in Article I, Section A, paragraph 1 (hereinafter referred to as the Seattle-Renton Unit), of this Agreement who are members of the Union on or after the thirtieth day following the beginning of their employment in the Seattle-Renton Unit or the thirtieth day following the effective data of this Agreement, whichever date is the

later, or become members of the Union after such later date, shall as a condition of continued employment maintain their membership in good standing in the Union during the life of this Agreement or any renewal thereof.

2. Employee members of the Union who are within the Seattle-Renton Unit, whose services with the employer are terminated under this Agreement for any reason, and who later are reemployed or reinstated under this Agreement shall, not later than the thirty-first day following such date of reemployment or reinstatement, reestablish and continue their membership in good standing in the Union as a condition of continued employment.

3. In the event an employee member of the Union, to whom paragraph 1 or 2 applies, fails to maintain his membership in the Union in good standing therein by the regular payment of dues, the Union will notify the Company in writing, through the Corporate Labor Relations Office or through such other office as may be designated by the Company, of such employee's delinquency. The Company agrees to advise such employee that his employment status with the Company is in jeopardy and that his failure to meet his membership obligations with the Union within five days will result in his termination of employment.

4. Subject to paragraph 2 of this Section, those individuals who, on the effective date of this Agreement (date of execution), are employees of the Company within the Seattle-Renton Unit and are not members of the Union, shall not thereafter be required to become members of the Union as a condition of continued employment, and paragraph 5 of this Section shall not apply to them. Those on layoff or leave of absence from the Unit, or otherwise are identified as part of the Unit, who have not lost seniority under the terms of Article VI, Section B, of this Agreement, shall be regarded as employees for the purposes of this paragraph.

5. Subject to paragraph 2 of this Section, those individuals who, after the effective date of this Agreement, are either hired into the Seattle-Renton Unit

or are transferred to it or otherwise become employed within it after that date, shall be subject for the effective term of this Agreement to the following requirements in regard to Union membership:

a. If such an individual is not a member of the Union on the date that is thirty days after the day upon which he became an employee in the Unit, or if later, the date that is the thirtieth day after this Agreement became effective, he shall have the right to elect to become a member of the Union or to elect not to become a member of the Union, as further provided in this paragraph 5.

b. He shall have one period, and one period only, during which he may exercise the right of election as stated in a. Such period is hereinafter referred to as his "period of election." His period of election shall be the ten-day period immediately following the date mentioned in a.

c. During the particular period applicable to him, as provided in b. above, and at no other time, he may give notice that he does not desire to become a Union member. If he does not give such notice within his period of election, he shall be required to become a member of the Union within twenty days after expiration of his period of election, as a condition of his continued employment by the Company. If he gives such notice, he shall not thereafter be required to become a member of the Union as a condition of his continued employment by the Company unless he so elects to join.

d. The notice mentioned in c. above, if it is given, shall be in writing, to the Union and shall be addressed as follows:

Aeronautical Industrial District Lodge 751
International Association of Machinists,
AFL-CIO
5502 Airport Way South
Seattle, Washington 98108

with copy to the Company, which may be addressed as follows:

The Boeing Company
Corporate Labor Relations Office
Mail Stop 10-11
P.O. Box 3707
Seattle, Washington 98124

The notice, if given, shall state that the individual does not desire to become a member of the Union or contain a statement in other language that reasonably conveys that meaning. The notice to the Union and the copy to the Company shall be mailed by either certified or registered mail. The mailing must occur within his period of election.

e. At or about the time of hiring or otherwise becoming a part of the Seattle-Renton Unit, and also prior to his period of election, he may be notified by the Company of his privileges, rights and obligations under this Section.

6. The provisions of this Section A relating to employees within the Seattle-Renton Unit shall apply to employees within units covered by this Agreement and identified with other Primary Locations where permitted by the law applicable at the Primary Location. Where the application of such provisions is not permitted by state law at a Primary Location, they shall not apply to Remote Locations identified with the Primary Location. In regard to those collective bargaining units covered by this Agreement that are identified with Primary Locations in states where application of Union security provisions such as those stated in this Section is not legally permitted as of the effective date of this Agreement, and in regard to employees within such units:

a. In the event the application of such provisions were to become permissible under the law of such a state during the effective period of this Agreement, provisions such as those applicable to the Seattle-Renton Unit under this Section shall

become applicable to the collective bargaining unit identified with the Primary Location in that state, subject to b. of this paragraph 6, when such application becomes legal.

b. In regard to the provisions in paragraphs 1, 4 and 5 above, the date upon which the application of such provisions becomes lawful under the laws of the state would be used instead of the effective date of this Agreement.

7. The Company will furnish to the Union headquarters at each Primary Location a weekly bill containing the name and address of each new hire, rehire and transferee into the bargaining unit. Such list also will cover such transactions at the Remote Locations identified with the Primary Location. The lists will contain the most current information available.

• • •

[G.C. Ex. 9]

Booster Lodge No. 405

International Association of Machinists
and Aerospace Workers
POST OFFICE BOX 29240
NEW ORLEANS, LOUISIANA 70129

Area Code 504
254-0550

First IAM Aerospace Lodge

November 4, 1965

Mr. John E. Mau
Labor Relations Representative
The Boeing Company
Post Office Box 29100
New Orleans, Louisiana 70129

Dear Sir:

Attached is a list of Boeing employees who wrote certified letters, either to District 751, or Local Lodge 405, terminating their membership in the International Association of Machinists and Aerospace Workers.

If any further information is needed, please feel free to contact us.

Yours very truly,

Gene P. Griffith

Gene P. Griffith
Secretary-Treasurer
Local Lodge 405 IAM&AW

GPG/jb OEIU #60

ABBOTT, CARMEN L.
ACHEE, RONALD
ACOSTA, ABEL J.
ADAMS, WILLIAM H.
ANZALONE, JONATHOUS A.
ANDERSON, CLIFFORD A.
ARAGON, JOHN C.
ARPETZIG, JOHN B. JR.
ARTHUR, RONALD
BAILEY, RICHARD D.
BARNER, ROBERT L.
BARRON, HOWARD H.
BAUER, WILLIAM P.
BEARD, RAYMOND J.
BEARDEN, DAVID D.
BENNETT, JAMES W.
BENSHOOF, WILLIAM A.
BLAIR, BERNARD J.
BLEVINS, JAMES E.
BONDIO, SALVADORE A.
BORDELON, KATHLEEN M.
BOYD, BETTY ANN
BOYD, JAMES L.
BRANYON, JOHN D.
BRELAND, VERNON A.
BREWER, JOSEPH H.
BRINGER, MELVIN L.
BROWN, CAROLINE D.
BUCHANAN, ELBERT O.
BUDD, EDWARD P.
BUREAU, GAYLORD L.
BUTLER, DAVID C.
BYRNE, EDWARD, JR.
BURR, KARVIN L.
CARLY, JOSEPH W.
CARUSO, BERNARD C.
CARUSO, VINCENT D.
CASCIO, AUGUST J.
CHAMBLESS, RAYMOND F., JR.
CHOUEST, ADAM H.
CLARK, KATHRYN M.
CLARK, RICHARD M.
CLEMENTS, ERSLER
CLARK, ARDITH D.
COLE, ELEANOR B.
COMPTON, JAMES R.
COLE, ESTIE L.
COMFORTO, JOSEPH D.
CONNIFF, JOHN T.
COPELAND, ANDRE M.
COY, THOMAS A.
CRAIG, VERNON T.
CROSY, WAYNE R.
CRUSTO, WILMA
CUEVAS, THOMAS G.
CULBERTSON, EUGENE F.
CULLEN, ROBERT L.
CURULLA, VIRGINIA M.
DELAUP, GERALD J.
DELCAMBRE, FRANCIS
DOBSON, CHERYL D.
DUSKIN, PERRY J.
DUBUQUE, ARTHUR E.
DURAND, RALPH J.
DUTRUCH, BYRDIE
ELLIOTT, JAMES E.
ELLIS, GEORGE
ELLIS, RODGER E.
EPPERLY, SHERMAN E.
ENNIS, HENRY, JR.
FAHRENBACHER, DOROTHEA
FAHRENBACHER, RONALD J.
FLUBACHER, HAROLD T.
FRADELLA, JOSEPH J.
FRADELLA, WILLIAM H.
FRAYLE, ANTHONY
FRITZ, KENNETH P.
FYE, HARRY D.
GAGLIANO, ALFRED J.
GAGLIANO, LOUIS J.
GAUGE, PETER
GARCIA, ANTHONY P.
GIARDINA, PHILIP M.
GILBERT, JOSEPH M.
GILBERT, PEGGY
GOMEZ, PETER D.
GRAY, JESSE H.

GREEN, COLLEEN C.
GREEN, ELTON L.
GRIGG, JESSIE C.
GROAT, ROBERT E.
HALE, ROBERT J.
HALL, HERBERT D.
HAMAKER, RUDOLPH P., JR.
HAMILTON, LOUIS
HARDING, ROBERT H.
HARSCHBERGER, ARCIL W.
HARVEY, GLENN
HASKINS, ALBERT F.
HAYDEL, LIONEL D.
HEDGES, HASKEL E.
HIDALGO, VERNON
HIGHSMITH, FRED L.
HILTON, MARY E.
HINES, LEMIE L.
HINES, CHARLES L.
HODGES, DONNA L.
HOFFMAN, ARTHUR M.
HOLLOWAY, REGGIE C.
HOOKS, SHIRLEY A.
HOPE, JESSE R.
HOWARD, FAY C.
HOWARD, WILLIAM F.
HOWIN, JEFFREY C.
HUEY, D. W.
HULL, IRENE A.
IRWIN, ALGY
JACOBS, HARRY J.
JAMES, CHESTER M.
JASPER, PETER P.
JONES, ORA M.
KATZ, HARRY
KAUFFEYER, DALE M.
KEITH, MICHAEL F.
KILLOUGH, DAN R.
KING, FRANCIS J.
KIRK, EUGENE F.
KOJARA, RICHARD T.
KOPS, MURRAY
KREGER, JERRY R.
LACK, DARRELL H.
LACOMBE, DALLAS J.
LA NASA, MARY
LANDRY, RONALD P.
LEE, TERRY W.
LEESON, RONALD E.
LEVINS, ARLEN D.
LILLY, WILLIS A.
LIPSCOMBE, RUBY L.
LITTLE, ARLENE
LITTLEJOHN, SHIRLEY
LOGAN, WOODWARD B.
LOMBARD, WALLACE W.
LOTT, CAROLYN
LOTT, HARVEY L., JR.
LOWENTHAL, JERRIE D.
MARTIN, EVELYN
MARTZ, JOSEPH L.
MATHEWS, RAYMOND D.
MC AHIS, LARRY J.
MC CALLUM, KENNETH R.
MC FADDEN, LELAND J.
MC FARLAND, CLARENCE
MC GEE, CHARLES D.
MELANCON, WARREN A.
MERIWETHER, DAVID H.
MC HENRY, CARL
MILLER, ALVIN D.
MORGAN, CARROLL S.
MORTILLARO, SALVADORE A
MOSER, J. D. C.
MULLEN, I. JAMES
MURRAY, ROBERT L.
NEUMAN, CAROL L.
NEUMAN, WILLIAM F.
NICOLOSI, EULA BELLE
NUGENT, JAMES I.
NUNGESSER, DARREL
O'NEAL, RICHARD B.
OVELLETTE, JOE F.
PAIOLE, JIMMY M.
PARKER, GRACIE
PARKER, MARY
PHILIP, HENRY C.
PINCOFF, JOHN G.

POPE, JOYCE
POWELL, LOUIS P.
RAKES, MARVIN E.
RATZEL, SUSAN A.
RAYBURN, GLORIA D.
REED, KATHLEEN L.
RICHARDS, ALEX J.
ROBINETTE, JOACHIM
ROBINSON, BILL J.
RODRIGUEZ, DELTON R.
RUFFT, ELEANOR
RUSSELL, WILLIAM H.
SADLER, WILLIAM H.
SAYLOR, ARTHUR H.
SAUCIER, EARL
SCHAFF, DENIS
SCHROADER, LEONARD E.
SCIPIONE, RONALD A.
SEALES, BETTY J.
SEALES, WALTER E.
SHELBY, ALICE
SHERMAN, OLIVA M.
SLOAN, THERESA N.
SMITH, ALAN L.
SMITH, RILEY
SMITH, TOMMY W.
SMITH, WILLIAM R., JR.
STANTON, JAMES C.
STAUB, LOUIS H.
STEELER, PAUL G.
STERLING, LOUIS L.
STEVENSON, GLENN L.
STIRLING, ROBERT B.
STONE, JOHN W.
STOUT, JAMES A.
TATUM, WINEFRED L.
TAYLOR, MYRTIS
THOMAS, GLADYS
THOMPSON, DOROTHY M.
TILLER, CHARLES R.
TILLER, KAREN J.
TIMMONS, SHANNON F.
TRAVIS, DENNIS
TRAVIS, LILLIAN
TROTTER, WILBUR S.
TROTTER, WILLIAM A.
TUCKER, JERRY
VINSON, ANN M.
WAGNER, DONALD R.
WARNER, RICHARD A.
WHITING, CLINTON M.
WILLIAMS, DOUGLAS F.
WILLIAMS, GEORGE F.
WILLIAMS, GWENDELL F.
WILLIAMS, ROSS E.
WILLIAMS, VIOLA L.
WILSON, ROY H.
WINDMANN, CALVIN C.
WOOD, DONALD R.
YARBOROUGH, THOMAS L.

[G.C. Ex. 10]

BOOSTER LODGE NO. 405
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
POST OFFICE BOX 29248
NEW ORLEANS, LOUISIANA 70129

November 17, 1965

L. D. Haydel
Rt. 1 Box 224 A
Holden, La. 70744

Dear Sir:

You have been charged with violating the International Association of Machinists and Aerospace Workers Constitution. The specific charge is Article XXIV, Section 3, Article L, which states: "Accepting employment in any capacity in an establishment where a strike, or lockout exists as recognized under this constitution without permission."

The Trial Committee appointed by President Roger E. Hilton, Local Lodge 405, has met and feel there is sufficient evidence to hold a trial.

You are hereby notified that this trial will be held Saturday December 11, 1965 at 9:45 A.M., in the Union Hall, 13344 Chef Menteur Highway. At this time the charges will be read and you have the right to have an attorney (the attorney being a member of the IAMAW) to defend you. Under the Constitution, if you fail to appear for trial when notified, the trial shall proceed as though the member were in fact present.

Yours truly,

TRIAL COMMITTEE
Local Lodge 405, IAMAW

Ben Ketchum
Chairman

[G.C. Ex. 11]

BOOSTER LODGE NO. 405
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
POST OFFICE BOX 29248
NEW ORLEANS, LOUISIANA 70129

Dear

You have been found guilty by the members of Local Lodge #405, International Association of Machinists and Aerospace Workers, of violating the IAM&AW Constitution, Article L, Section 3. You violated the Constitution when you accepted employment in an establishment where a strike existed as recognized by this Constitution. This strike was against The Boeing Company.

The members of Local Lodge #405, IAM&AW, have assessed the following penalty:

1. That you be fined $450.00. This fine to be suspended providing you pay 50% of your earnings while working during the strike, and agree to attend all regular meetings of this Lodge during the next twelve (12) months.

2. That you be denied the privilege of holding office in the IAM&AW for the time stated at your trial. If you worked less than three (3) days - one (1) year; three (3) to ten (10) days - three (3) years; ten (10) days or more - five (5) years.

This trial was held according to the Constitution of the IAM&AW. If you do not agree with the decision of the members of this Lodge, you may appeal to the International President, P. L. Siemiller. This must be done by January 18, 1966. If you do not appeal, the decision will be final and you must make arrangements to comply with the penalty within thirty (30) days from the date the verdict was rendered (December 18, 1965), Article F, Section 1, of the IAM&AW Constitution.

Fraternally yours,

William G. Irby

William G. Irby
Acting Recording Secretary
Local Lodge #405, IAM&AW

[G.C. Ex. 12]

Dear Sir:

You have been found guilty by the members of Local Lodge #405, International Association of Machinists and Aerospace Workers of violating the IAMAW Constitution, Article L, Section 3. You violated the Constitution when you accepted employment in an establishment where a strike existed as recognized by this Constitution. This strike was against The Boeing Company.

The members of Local Lodge #405, IAMAW, have assessed the following penalty:

1. That you be fine $450.00.

2. That you be denied the privilege of holding office in the IAMAW for a period of five (5) years.

This trial was held according to the Constitution of the IAMAW. If you do not agree with the decision of the members of this Lodge, you may appeal to the International President, P. L. Siemiller. This must be done by January 18, 1966. If you do not appeal, the decision will be final and you must make arrangements to comply with the penalty within thirty (30) days, December 18, 1965 (the date the verdict was rendered), Article F, Section 1, of the I. A. M. & A. W. Constitution.

Fraternally yours,

William G. Irby
Acting Recording Secretary
Local Lodge #405, IAMAW

WGI/jo ociu #60

[G.C. Ex. 13]

Booster Lodge No. 405

International Association of Machinists
and Aerospace Workers
POST OFFICE BOX 29248
NEW ORLEANS, LOUISIANA 70129

First IAM Aerospace Lodge

Area Code 504
944-0130

November 3, 1967

Dear Sir and Brother:

After the strike in 1965, you were found guilty, on your own admission, of crossing the picket lines, and fined 50% of the wages you earned behind the lines. Our records show that your fine has yet to be paid in full.

Would you please contact Business Representative, Roger Hilton, at the Union Hall in person or by phone before 15 November, 1967 to discuss payment since we are now in the process of turning all fines over to our attorney for collection.

Failure to do so could cause your fine to be increased to $450.00 as was noted at your trial.

Yours truly,

Donald C. Verigan
President

DCV:ss

[G.C. Ex. 14]

Booster Lodge No. 405

International Association of Machinists
and Aerospace Workers
POST OFFICE BOX 29248
NEW ORLEANS, LOUISIANA 70129

Est 1914 Aerospace Lodge

Area Code 504
3546559

November 3, 1967

Dear Sir and Brother:

After the strike in 1965, you were found guilty of crossing the picket lines and fined $450.00. Upon receipt of your request for reconsideration, the membership reduced your fine to 50% of the wages you earned behind the lines. Our records show that your fine has yet to be paid in full.

Would you please contact Business Representative, Roger Hilton, at the Union Hall in person or by phone before 15 November, 1967 to discuss payment since we are now in the process of turning all fines over to our attorney for collection.

Failure to do so could cause your fine to be increased to $450.00 as was noted at your trial.

Fraternally yours,

Donald C. Verigan
President

DCV:ss

[G.C. Ex. 15]

RECEIVED
NLRB-14TH REG.
NEW ORLEANS, LA.
FEB 7 8 25 AM '56

February 2, 1956

Mr. Henry Kahn
925 Broadway
New Orleans, Louisiana

Dear Mr. Kahn:

The undersigned represents Teamster Lodge No. 496, International Association of Machinists and Aerospace Workers, AFL-CIO, of which you are a member.

Pursuant to the lawful procedure of the Union, you have been found guilty by the Local Lodge of violating Article 1, Section 5 of the International Constitution and as a part of the penalty assessed against you, you have been fined $450.00. The time for appeal has now passed and the decision of the Local Lodge, specifically the fine imposed is now executory. As yet, no payment has been received from you. The Lodge has referred the matter to us for attention and collection.

Demand is made upon you for the immediate payment in full of the $450.00 fine by virtue of the proceedings referred to. Your failure to respond promptly will require our filing suit against you, with the additional cost to you of attorney fees and court costs incurred by the Union in the process, plus legal interest.

Very truly yours,

DODD, MINTZ, MORGAN & NEWMAN

By: Thomas J. Mintz

List of Those Paid $450 by
I.B. and in Local 405 in Indiana

Abbatiello, Carmen L.	450.00
Anderson, Clifford R.	450.00
Anaejo, John C.	450.00
Bailey, Richard D.	450.00
Barrad, Howard H.	450.00
Bauer, William P.	450.00
Bievins, J.E.	450.00
Bengo, H.E.	450.00
Bordelon, Kathleen M.	450.00
Boyd, Betty Ann	450.00
Brown, Carlisle D.	450.00
Butler, David C.	450.00
[illegible]	
Caruso, Vincent	450.00
Cike, M	450.00
Clark, Kathryn H.	450.00
Claude, A.S.	450.00
Cunniff, John T.	450.00
Cowan, Frank	450.00
Cox, Thomas A.	450.00
Crosby, Wayne R.	450.00
Cuesta, William	450.00
Cullen, Robert L.	450.00
Delany, Gerald J.	450.00

Durkin, Percy J.	450.00
Dubuque, Arthur E.	450.00
Elliott, James R.	450.00
Ellis, Roger E.	450.00
Epperly, Sherman E.	450.00
Fahrenbacker, Dorothea	450.00
Fahrenbacker, Ronald J.	450.00
Flubacher, Marie T.	450.00
Frye, Harry D	450.00
Gilbert, Gregory	450.00
Green, Edlon	450.00
Green, J. H.	450.00
Hart, Robert E.	450.00
Hale, Robert J.	450.00
Hall, Herbert D.	450.00
Hamaker, Rudolph P., Jr.	450.00
Hamilton, Louis	450.00
Harding, Robert H.	450.00
Haydel, Lionel D.	450.00
Henzig, Haskel E.	450.00
Hines, Lewis L.	450.00
Hodges, Dorine L.	450.00
Holmes, Arthur M.	450.00
Holloway, Reggie C.	450.00
Hooks, Shirley A.	450.00
Hope, James R.	450.00
Howard, Guy C.	450.00

Jones, Nancy C.	450.00	
Jasper, Peter P.	450.00	
Kelly, Harry	450.00	
Kalkmeyer, Dale M.	450.00	
Keim, Michael F.	450.00	
King, Francis J.	450.00	
Komara, Richard T.	450.00	
Kopp, Murray	450.00	
Kozer, E.C.	450.00	
Lack, Darrell H.	450.00	
Lanasa, Mary	450.00	
Lee, Terry W.	450.00	
Leem, Ronald E.	450.00	
Lilly, Willis A.	450.00	
Lipscombe, Ray L.	450.00	
Littlejohn, Shirley	450.00	
Lorbard, Wallace W.	450.00	
Lott, Carolyn	450.00	50%
Marty, Joseph L.	450.00	
Matthews, Reginald D.	450.00	
McCallum, Kenneth R.	450.00	
McFadden, Leland J.	450.00	
McGee, Charles D.	450.00	
Meriwether, David H.	450.00	
McNerney, Carl	450.00	
Miller, Calvin D.	450.00	
Miller, C.D.	450.00	

Moses, J.D.C.	450.00
Mullen, I. James	450.00
Newman, Carol L.	450.00
Nisolari, Eula Belle	450.00
O'neal, Richard B.	450.00
Pope, Joyce	450.00
Perdue, George	450.00
Perkes, Marvin E.	450.00
Rabrich, R. J.	450.00
Rayfron, Gloria D.	450.00
Reed, Kathleen	450.00
Richards, Alex J.	450.00
Runft, Eleanor	450.00
Schroeder, Leonard E.	450.00
Schelly, Alice	450.00
Staub, Louis H.	450.00
Stone, John W.	450.00
Stort, Grace A.	450.00
Stanley, P.	450.00
Taylor, Royster	450.00
Thompson, Dorothy R.	450.00
Tibbs, Charles R.	450.00
Tiller, Karen J.	450.00
Travis, Dennis	450.00
Tucker, Jerry	450.00
Warner, Richard A.	450.00
White, Rosalie	450.00

50 % Firm

	Firm	Collected	
Bal Brandt	50 %		
J. H. Brewer	50 %		
Buchanan, E.O.	50 %	10.20	PIF
Budd	50 %	$23.00	PIF
Clark, R.N.	50 %	$81.75	PIF
Craig, V.T.	50 %	-	
Higginbotham, AL	50 %	7.50	PIF
Hull, I.A.	50 %	21.00	PIF
N.C. James	50 %	12.00	PIF
O.M. Jones	50 %	5.00	
Killough	50 %	12.50	PIF
Lott, W.L.	50 %	60.00	PIF
McInnis, L.J.	50 %		
Mardilleau, S.A.	50 %	54.80	PIF
Murray, R.L.	50 %	77.00	PIF
Nugent, I.I	50 %	18.00	PIF
Overcutter, J.F.	50 %		
Parker, G.	50 %	120.00	PIF
Prunkey, L.	50 %	15.40	PIF
Quinmore, J.	50 %		
Marie Bloom	50 %	5.00	
Gibbs, W.	50 %	67.20	PIF
Vander Kant, C.	50 %		
R. Thomas	50 %		
Wyrick, C.T.	50 %	12.00	PIF

C. R. Nobley	50 %	
Reford, C.	50 %	13 mo. PIF
Irwin, Peggy	50 %	
Scott, Carolyn	50 %	5 mo. "
Sloan, T.	50 %	10 mo. PIF
Robinette	50 %	
Wagner, J. R.	50 %	
Williams, J. F.	50 %	
Williams G F	50 %	
Sadler, W. H.	50 %	18, 52 PIF
Montgomery, Jesse	50 %	
W. R. Kelly	No Fine	(Appealed)
Ratzel, Susan A.	Not Guilty	
Boyd, J. L.	Not Guilty	
Cole, Estie L.	Mistrial	not retried

[G.C. Ex. 17]

Defendants Name & Address	Suits filed & first three Defendants Court
(1) P.J. Dustin (450.00) 1517 Tennessee St. N.O., La. 70117	First City Court City of New Orleans
(2) Wilma Crousto, (450.00) 2611 St. Peter St. N.O., La.	First City Court City of N.O.
(3) Clifford Anderson (450.00) 3110 N. Derbigny N.O., La.	First City Court City of N.O.
(4) A. J. Claude (450.00) 1719 Sere N.O., La.	First City Court City of N.O.
(5) Dennis R. Travis (450.00) 1309 St. Bernard Chalmette La.	25th J.D.C. Parish of St. Bernard

(6) Theresa White (450) 1927 Amelia St. N.O., La.	First City Court City of N.O.
(7) R.C. Hollander (450) 768 Chas. Mentevia Hgwy. N.O., La.	First City Court City of N.O.
(8) W.P. Bauer (450) 505 Walker Dr. N.O., La. (own)	First City Court City of N.O.
(9) Thomas J. Kiss (450) 4874 Orleans N.O., La.	First City Court City of N.O.

Abbott, Carmen L. 9/20/65
13051 Deauville Ct.
New Orleans 70129, La.

Achee, Ronald 9/17/65
502 Andry New Orleans, La.

Acocta, Abel J. 9/28/65
813 Athania Pkwy
Metairie, La.

Adams, William Maurice 9/16/65
411-58-6940
Boeing-Michoud

Anzalone, Ignatious A. 9/27/65
434-32-6520
5-3740 Boeing-Michoud

Aragon, John C. 9/19/65
6227 St. Anthony St.
New Orleans, Louisiana

Anderson, Clifford A. 9/24/65
436-58-3698
3110 N. Derbigny St
New Orleans, La.

Aragon, John C. 9/22/65
6227 St Anthony Street
New Orleans, Louisiana

Arreteig, John B. Jr. 9/17/65
434-52-2355
P.O. Box 194
Ponchataula, La.

Arthur, Ronald 9/18/65
Boeing-Michoud Operations
New Orleans, Louisiana

Bailey, Richard D. 9/17/65
AE86372
Slidell, La.

Barker, Robert L. 9/20/65
13801 Chef Menteur
New Orleans, La.

Barron, Howard H. 9/23/65
8005 Grant St.
New Orleans, La.

Bauer, William P. 9/28/65
505 Wallace Dr.
New Orleans, La.

Beard, Raymond J. 9/17/65
436-60-8369
2005 Royal St.
New Orleans, La.

Bentley, James W. 9/28/65
437-44-5378
Michoud Facility
New Orleans

Bearden, David D. 9/20/65
416-42-3252
37 Old Hickory Dr.
Chalmette, La.

Benshoof, William A. 9/17/65
1145 Maris Stella
Slidell, La.

Blair, Bernard J. 9/23/65
2023 Montegit St.
New Orleans, La.

Blevins, James E. 9/21/65
440-24-0520
287 Nassau Dr.
Blidell, La.

Bordelon, Kathleen M. 9/21/65
6657 Milne Blvd.
New Orleans, La.

Boyd, Betty Ann 9/17/65
Book #AB59312
1909 Minnesota St.
Kenner, La.

Boyd, James L. 9/25/65
T 83078
3316 Senclain
Chalmette, La.

Branyon, John D. 9/20/65
2215 Mithra St.
New Orleans, La.

Breland, Vernon A. 9/25/65
4718
2659 Jasmine
New Orleans, La.

Brewer, Joseph H. 9/22/65
1857 AD 75596
47 Papania Dr.
New Orleans, La.

Bringer, Melvin L. 9/18/65
8913 5-3774
3838 Pentchatrain Dr.
Slidell, La.

Brown, Caroline D. 9/24/65
Boeing Launch Systems Bra
(not Cert. or Neg)
New Orleans, La.

Budd, Edward P. 9/24/65
017-02-9958
53 East Chalmette Circle
Chalmette, La.

Buchanan, Elbert Odie 9/23/65
435-28-4867
59 W. Claibaine Sq.
Chalmette, La.

Butler, David C. 9/17/65
437-66-0591
1701 N. Hullen
Metairie, La.

Byrne, Edward Jr. 9/25/65
3821 Palmyra St.
New Orleans, La.
(out of order)

Burr, Marvin L. 9/30/65
6114 Arts St.
New Orleans, La.

Carey, Joseph W. 9/17/65
436-54-0708
327 N. Bernadatte Street
New Orleans, La.

Caruso, Bernard O. 9/28/65
439-68-8876
500 Andry Street
New Orleans, La.

Caruso, Vincent B. 9/27/65
#16 St. Claude Ct.
New Orleans, La.

Cascio, August J. 9/16/65
2109 Airline Park Blvd
Metairie, La.

Chamblee, Raymond F. Jr. 9/13/65
717 Citrus St.
Slidell, La.

Chamblee, Raymond F. Jr. (dup. 9/17/65)

Chouest, Adam M. 9/21/65
438-54-2265
757 Madewood Dr.
LaPlace, La.

Clark, Kathryn H. 9/20/65
121-18-6091
3939 Arrowhead Dr.
Slidell, La.

Clark, Richard N. 9/27/65
6818 Gen Diaz St.
New Orleans, La.

Clements, Ersler 9/22/65
4900 Read Blvd
New Orleans, La.

Clark, Ardith D. 9/20/65
432-56-8803
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Huntsville, Alabama

Cilo, Eleanor E. 9/17/65
3126 Broadway Street
New Orleans, La.

Compton, James Robert 9/21/65
1691½ Robert Street
New Orleans, La.

Cole, Estie L. 9/22/65
11658 Chef Menteur Hwy.
New Orleans, La.

Jonforto, Joseph D. 9/22/65
4712 Tulip St.
New Orleans, La.

Conniff, John T. 9/19/65
2546 Madrid Street
Apartment 209
New Orleans, La.

Conniff, John 9/21/65
6319 St. Roch St.
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Copeland, Andre M. 9/22/65
431-60-3901
11658 Chef Menteur
New Orleans, La.

Craig, Vernon Thomas
4350 Stemway Dr. #43
New Orleans, La.
9/17/65

Crosby, Wayne Richard
061-32-1723
7500 Chef Hyw.
New Orleans, La.
6/16/65

Crouse, Robert B.
6026 Haynes Blvd.
New Orleans, La.
10/2/65

Crusto, Wilma
2611 St. Peter St.
New Orleans, La.
9/16/25

Cuevas, Thomas G.
Clock No. 7757
321 P.O. Box
Madisonville, La.
9/26/65

Culbertson, Eugene F.
6674
9/25/65

Cullen, Robert Leo
4511 C. Seminary Pl.
New Orleans, La.
9/18/65

Curulla, Virginia M.
4851 Frair Tuck Dr.
New Orleans, La.
9/18/65
Worked 9/20

Denlaup, Gerald John
4941 Laine Ave.
New Orleans, La.
9/20/65

Delcambre, Francis
434-16-9082
Gen. Del.
Slidell, La.
9/20/65

Dobson, Cheryl D.
433-68-8101
4316 Dodt Avenue
New Orleans, La.
9/18/65

DuSkin (†), Perry Joseph
1517 Tennessee, St.
New Orleans, La.
9/30/65

Dubuque, Arthur E.
539-26-1968
4675 Werner Dr.
New Orleans, La.
9/24/65

Durand, Ralph J. LV
2413 Haring Rd.
Metairie, La.
9/21/65

Dutruch, Birdie
3520 Delambert
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9/17/65

Elliott, James R.
028-32-3638
P. O. Box 1078
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9/22/65

Ellis, George Robert
3428 Camphor St.
New Orleans, La.
9/23/65

Ellis, Rodger E.
535-40-0125
4907 Magazine St.
New Orleans, La.
9/17/65

Epperly, Sherman E.
Rt 1 Box BA66
Perl River, La.
9/30/65

Ennis, Henry Jr.
422-03-2017
2216 N. Memorial Pkwy Apt. 6A
Huntsville, Alabama
9/17/65

Fahrenbacher, Dorothea Marion
2312 Delille Apt. B
Chamette, La.
9/21/65

Fahrenbacher, Ronald Joseph
2312 Delille Apt. B
Chalmette, La.
9/20/65
Worked 9/20

Flubacher, Marie T.
438-28-1719
5833 Milne Street
New Orleans, La.
9/16/65

Fradella, Joseph J.
Rt. 3—Box 288
Slidell, La.
9/22/65

Fradella, William H.
3914
Rt. 3—Box 288
Slidell, La.
9/22/65

Frayle, Anthony
4559 Shalimar Dr.
New Orleans, La.
436-50-7647
9/22/65

Fritz, Kenneth P. 9/20/65
438-62-6800
2836 St. Thomas Street
New Orleans, La.

Fye, Harry D. 9/17/65
513-05-4462
1215 St. Scholastion
Slidell, La.

Gagliano, Alfred J. 9/20/65
3967 Downman Rd.
New Orleans, La.

Gange, Peter 9/30/65
1205 Kildare Street
Huntsville, Alabama

Garcia, Anthony P. 9/21/65
438-48-8984
144 Jeanne Dr.
Westwego, La.

Giardina, Philip W. 9/27/65
7904
Huntsville, Alabama

Gilbert, Joseph W. II 9/17/65
539-40-5266
Huntsville, Alabama

Gilbert, Peggy 9/20/65
418-44-0092 Worked 9/21
3113 Cleary Ave.
Metairie, La.

Gomez, Peter D. 9/29/65
65 Carolyn Court
Arabi, La.

Gray, Jesse H. 9/28/65
522½ Jefferson Ave.
New Orleans, La.

Green, Colleen C. (Slawson)
515-24-4234 9/16/65
4619 Citrus Dr.
New Orleans, La.

Green, Eldon L. 9/16/65
536-36-8722
4619 Citrus Dr.
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Grigg, Jessie Calvin 9/16/65
418-36-6954
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Great, Robert E. 9/22/65
515-09-9027
3653 Riviera Dr.
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Hale, Robert J. 9/21/65
Book No. #AB59336
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Barataria, La.

Hall, Herbert D. 9/25/65
1408
2907 Camellia Dr.
Slidell, La.

Hamaker, Rudolph P. Jr. 9/25/65
#AA 23595
171 Center Street
Arabi, La.

Hamilton, Louis 9/21/65
Clock # 1021
2400 Short St.
New Orleans, La.

Harding, Robert H. 9/22/65
Moon Meadow Trailer Park
404 Jones Street
Picayune, Mississippi

Harney, Glenn 9/27/65
436-66-0270
3115 Iberville
New Orleans, La.

Haskins, Albert F. 9/27/65
1207 Meridian Street
Huntsville, Alabama

Herzog, Haskel Eugene 9/18/65
456-58-2700
3114 Arkansas Ave.
Kenner, La.

Higginbotham, Fred L. 9/17/65
065-30-8806
1450 Tita St.
New Orleans, La.

Hilton, Mary E. 9/22/65
427-14-0931
1507 Westbrook, Apt B Worked 9/17
New Orleans, La.

Himes, Lewis L. 9/18/65
Rt. 1—Box 617
Gulfport, Miss.

Hines, Charles L. 10/1/65
AG 99005
410 Incarnate Word Dr.
Kenner, La.

Hodges, Donna Lee 9/28/65
344-66-5405
2809 Packenham Dr.
Chalmette, La.

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057-01-8483
13763 Chef Menteur
New Orleans, La.

Holloway, Roggie C. 9/21/65
421-54-7214

Hooks, Shirley A. 9/21/65
165-30-5264
Box 32—Rt. 1
St Bernard, La.

Hope, Jesse R. 9/17/65
AF 93716
P.O. Box 36
Slidell, La.

Howard, Fay C. 9/16/65
513 Friscoville, Ave.
Arabi, La.
420-26-3670

Howard, William Frosman 9/27/65
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Huntsville, Alabama

Houin, Feffrey C. 9/22/65
5128 Arts St. Apt 3
New Orleans, La.

Hull, Irene A. 9/18/65
13450 Chef Menteur #3
New Orleans, La.

Ice, E. 9/22/65
Village D'Lest
P. O. Box 29192
New Orleans, La.

Irwin, Algy (?Irvin) 10/1/65
2200 Tulip Street
New Orleans, La.

Jacobs, Harry Jay 9/22/65
434-12-7425

James, Chester M. 9/28/65
126 Bermuda Dr.
Slidell, La.

Jasper, Peter P. 9/20/65
522-20-0242
7705 Willow
New Orleans, La.

Jones, OraMae 9/25/65
4435 Pauger Street
New Orleans, La.

Katz, Harry 9/20/65
925 Broadway
New Orleans, La.

Kahmeyer, Dale M. 9/22/65
509-28-7223
501 Prosper
Chalmette, La.

Keim, Michael Frank 9/23/65
484-42-1562
7500 Chef Menteur Hwy.
New Orleans, La.

Kendrick, Eloise 9/22/65
2900 3rd St. Apt 18
New Orleans, La.

Killough, Dan B. 9/16/65
422-24-2601
222 Mockingbird Lane
Slidell, La.

King, Francis J. 9/17/65
535-14-0302
4809 Govenors Dr.
Huntsville, Alabama

Kirk, Eugene F. 9/17/65
455-20-6878
912 E. Goodchildren Lot 18 B
Chalmette, La.

Komara, Richard T. 9/22/65
170-26-5628
6345 Pandora St.
New Orleans, La.

Kops, Murray 9/16/65
2131 Jeff Ave.
New Orleans, La.

Kreger, Jerry R. 9/16/65
AG 98690
Rt. 2 Box 545 N
Slidell, La.

Lack, Darrell H. 9/17/65
#0147
4531 Desire Dr.
New Orleans, La.

Lacombe, Dallas J. Jr. 9/21/65
707 Pleasant St.
New Orleans, La.

LaNasa, Mary 9/22/65
716 Esplanade Ave.
New Orleans, La.

Landreaux, Jewel 10/2/65
P.O. Box 134
Meraux, La.

Landry, Ronald P. 9/27/65
439-60-1112

Leeson, Ronald E. 9/17/65
465-56-2282
Rt 2 Box 59
Slidell, La.

Lefort, Charles 10/4/65
710 Friscoville Ave.
Arabi, La.

Lilly, Willis Alton 9/21/65
434-58-2126
2256 North Roman St.
New Orleans, La.

Lipscombe, Ruby Lee 9/22/65
420-46-3600
1933 Licciardi Dr.
Chalmette, La.

Little, Arlene 9/16/65
Rt. 1 Box C 143
Belle Chasse, La.

Littlejohn, Shirley 9/20/65
242-3023
434-46-8362
4635 Schindler Dr.
New Orleans, La.

Logan, Woodward Blassen 9/16/65
439-58-0169
1603 Murl Street
New Orleans, La.

Lott, Carolyn 9/22/65
Rt. 1 Box 207
Slidell, A.

Lott, Harvey L., Jr. 9/21/65
417-48-8462
Rt. 1 Box 207
Slidell, La.

Lowenthal, Jerome D. 9/28/65
6122 Sandia Blvd.
Huntsville, Ala.

Martin, Evelyn 9/23//65
434-52-7050
713½ Austerlitz St.
New Orleans, La.

Martz, Joseph L. 9/18/65
7821½ Maple
New Orleans, La.

Mathews, Raymond D. 9/23/65
4 Ashley Court
Slidell, La.

McAmis, Larry J. 9/20/65
3501 Pontchartrain Rd.
Slidell, La.

McCallum, Kenneth Ray 9/21/65
465-48-2751
2834 Law St.
New Orleans, La.

McFadden, Leland J. 9/17/65
3420 Jackson Blvd.
Chelmette, La.

McFarland, Clarence 9/22/65
60801
109 A Lind St.
Waveland, Miss.

McGee, Charles David 9/24/65
436-64-7486
Apt. 109 Westchester Arms
Slidell, La.

Melancon, Warren August Jr. 9/17/65
4306 Stockton St.
Metairie, La.

Meriwether, David H. 9/20/65
521-32-5546
2604 Chalona Dr.
Chalmette, La.

McHenry, Carl 9/22/65
215 Maine Street
Slidell, La.

Miller, Alvin Douglas 9/18/65
511-38-8704
4316 Dodt Ave.
New Orleans, La.

Morgan, Carroll Sumner 9/21/65
442-10-7909
7323 Chef Menteur
New Orleans, La.

Mortillaro, Salvadore A. 9/27/65
8736 Olive St.
New Orleans, La.

Moser, J. D. C. 9/28/65
547-46-1011
Rt. #2, Box 548
Slidell, La.

Mullen, I. James II 9/16/65
3229 Banks Street
New Orleans, La.

Mullins, Ollie J. 10/2/65
8600 Chef Menteur
New Orleans, La.

Murray, Robert Leo 9/27/65
520-32-9248
206 Hummingbird Lane
Slidell, La.

Newman, Carol L. 9/19/65
535-30-9633
8741 Gervais
New Orleans, La.

Newman, William F. 9/18/65
550 E. Wm David
Metairie, La.
(unsigned letter)

Nicolosi, Lula Belle 9/20/65
439-05-6599
P.O. Box 194
Westwego, La.

Nugent, James I. Jr. 9/18/65
252-60-5402
Rt. 2—Box 20
Carriere, Miss.

Nungesser, Darrel 9/30/65
324-30-1609

O'Neal, Richard B. 9/30/65
4870
P.O. Box 99
Pearlington, Miss.

Ovellette, Joe F. R. 9/23/65
3728 Canal St. Apt. A
New Orleans, La.

Pangle, Jimmy W. 9/17/65
210 Oriole Dr.
Slidell, La.

Parker, Gracie 9/20/65
432-26-2823
8620 Chef Menteur Hw.
New Orleans, La.

Parker, Mary 9/30/65
P.O. Box 1326
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436-44-4978
2432 Lamanchest
New Orleans, La.

Pincoff, John G. 9/20/65
Rt. 1, Box 207
Slidell, La.

Pope, Joyce 9/16/65
438-48-8376
4678 Mirabeau Ave.
New Orleans, La.

Powell, Louis P. 9/22/65
427-07-1974
4942 Read Blvd.
New Orleans, La.

Rakes, Marvin E. 9/23/65
297-01-3126
4800 Schindler Dr.
New Orleans, La.

Ratzel, Susan Ann 9/22/65
284-30-6741
4559 Shalimar Dr.
New Orleans, La.

Rayburn, Gloria D. 9/22/65
318-26-1747
Rt. 1 Box 174 AAB
Pearl River, La.

Reed, Kathleen L. 9/21/65
3233
3125 Banks St.
New Orleans, La.

Richards, Alex J. 9/22/65
Book No. AF 35176
3808 Fifth St.
Harvey, La.

Robinette, Joachim Jr. 9/25/65
1963 Industry St.
New Orleans, La.

Robinson, Bill J. 9/22/65
4510 Papania Apt. 34
New Orleans, La.

Rodriguez, Delton R. 9/17/65
437-58-3927
Mary Ann Trailer Park
Merequez, La.

Runft (Runpt), Eleanor 9/21/65
3654 Riviera Dr.
Slidell, La.

Russell, William H. Jr. 9/22/65
520-34-4906

Rydyewski, Alvin J. 10/4/65
4557 East View Dr.
New Orleans, La.

Sadler, William H. 9/27/65
Clock # 2648
319 Fifth Ave.
Picayune, Miss.

Saylor, Arthur H. 10/1/65
500-20-0062
4760 Werner Dr. Worked 9/20
New Orleans, La.

Saucier, Earl 9/20/65
409 Kostmayer St.
Slidell, La.

Schaff, Denis III 9/24/65
2229 Barracks St.
New Orleans, La.

Schroader, Leonard Eugene 9/25/65
5908 Boutall
Metairie, La.

Scipione, Ronald A. 9/17/65
6544

Seales, Betty J. 9/21/65
P.O. Box 1461
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Seales, Walter E. 9/20/65
P.O. Box 1461
Chalmette, La.

Shelby, Alice 9/21/65
Rt. 1 Box 142
Lacombe, La.

Shewmake, Oliva M. 9/20/65
P.O. Box 1051
Chalmette, La.

Sloan, Theresa N. 10/1/65
435-34-0905
405 Doerr Dr.
Arabi, La.

Smith, Alan L. 9/21/65
4748 Lynhaber Dr.
New Orleans, La.

Smith, Tommy W. 9/24/65
1808 Mississippi
Kenney, La.

Smith, William R. Jr. 9/17/65
464-72-6158
1003 E. St. Bernard Hwy.
Chalmette, La.

Sorger, Robert R. Sr. 9/17/65
536-34-2593
Lapsed in 751 7/65
(in this letter was also the names:
Davis Billy W.—Applications
417-46-6934
Gilbert, Joseph W. II
539-40-5266

Stanton, James G. 9/28/65
2404 Nancy Dr.
Meraux, La.

Staub, Louis H. 9/17/65
495-07-5499
13501 Chef Menteur Hwy.
New Orleans, La.

Stender, Paul G. 9/17/65
4416-B Iroquois
New Orleans, La.

Sterling, Louis L. 9/27/65
7837 Jay St.
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Stevenson, Glenn L. 9/27/65
8323 Chef Menteur
New Orleans, La.

Stirling, Robert B. 9/24/65
Rt. 1 Box 479-V
Shady Lane Trailer Park
Slidell, La.

Stone, John W. 9/23/65
254-24-0678
P.O. Box 786
Slidell, La.

Stout, James A. 9/27/65
13801 Chef Menteur Hwy.
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514-34-0947

Tatum, Winefred L. 9/21/65
310 Union Street
Bay St. Louis, Miss.

Taylor, Myrtis 9/30/65
3600 Baronne St.
New Orleans, La.

Thomas, Gladys 9/20/65
2923 Castighone St.
New Orleans, La.

Thompson, Dorothy M. 9/17/65
513-09-1185
4763 Camelot Dr.
New Orleans, La.

Tiller, Charles R. 9/19/65
492-46-9389
2120 Robin St.
New Orleans, La.

Tiller, Karen Joan 9/17/65
9355
2120 Robin St.
New Orleans, La.

Timmons, Shamon F. 9/22/65
AGA 8840 420-44-0490
11214 Will Stutley Dr.
New Orleans, La.

Travis, Dennis 9/17/65
Chalmette Trailer Cr.
Chalmette, La.

Travis, Lillian 9/17/65
Chalmette Trailer Cr.
Chalmette, La.

Trotter, Wilbur S. 9/20/65
2419 S. 137th
Seattle, Washington

Trotter, William A. 9/22/65
410-62-6511

Tucker, Jerry 9/28/65
444-36-1385
Rt. 4 Box 328
Picayune, Miss.

Vinson, Ann Margaret 9/18/65
Chalmette, La.

Wagner, Donald R. 9/28/65
822 Herring Dr.
Picayune, Miss.

Warner, Richard A., Jr. 9/16/65
346-18-1449
DeLisle Harbor
DeLisle, Miss.

Whiting, Clinton M. 9/24/65
435-16-8837
6912 E. Louerne St.
New Orleans, La.

Williams, Douglas F. 9/17/65
262-68-9045
Rt. 1 Box 207
Slidell, La.

Williams, George F. 9/18/65
Rt. 1 Box 207
Slidell, La.

Williams, Gwendell F. 9/17/65
262-68-9080
11658 Chef Menteur Hwy.
New Orleans, La.

Williams, Viloa Louise 9/22/65
4925 Frankfort St.
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Wilson, Roy H. 9/22/65
409-58-8372

Windmann, Calvin C. 9/21/65
439-22-5333
3303 Rose Avenue
Chalmette, La.

Wood, Donald R. 9/18/65
AG 99085
410 South Salcedo
New Orleans, La.

Burgau, Gaylord L. 9/30/65
1725 Seventh St.
New Orleans, La.

Brown, Roland B. 10/1/65
#AG 98958
3533 Broadway St.
New Orleans, La.

Gagliano, Louis Charles 10/1/65
487-52-3593
125 Mink Dr.
Arabi, La.

Yarborough, Thomas L. 9/28/65
3222 Carey St.
Slidell, La.

Hitchens, Mildred Catherina 10/4/65
932 St. Claude Ave.
New Orleans, La.
438-20-4581

Coy, Thomas A. 9/20/65
484-30-5847
127 Cawthorne Dr.
Slidell, La.

ADVICE TO HOURLY EMPLOYEES WHO WISH TO TERMINATE THEIR MEMBERSHIP IN THE INTERNATIONAL ASSOCIATION OF MACHINIST UNION

1. The Company does not encourage or discourage anyone from withdrawing his membership from the Union, and . . .
2. The Company cannot assure the employee that sending a letter will terminate his membership in the Union. However, in the past, the procedure has been to send a registered or certified letter to the Union and to the Company in Seattle stating he wishes to terminate his membership in the Union and to cancel his payroll authorization for Union dues deductions.

Aeronautical Industrial District Lodge 751
International Association of Machinist
AFL-CIO
5502 Airport Way South
Seattle 25, Washington

Corporate Labor Relations Office
Mail Stop 10-11
Post Office Box 3707
Seattle 24, Washington

NOTICE TO THOSE RECENTLY HIRED OR TRANSFERRED INTO CERTAIN PRODUCTION AND MAINTENANCE JOBS

(Union Membership Requirements—Seattle-Renton Hourly Production and Maintenance Unit Represented by Lodge 751, including Remote Locations that are part of such Unit)

In the job to which you have been hired or into which you have been transferred you have become part of the collective bargaining unit for which Aeronautical Industrial District Lodge 751, IAM, AFL-CIO (the Union) is the certified agent. All employees in this collective bargaining unit are represented by this Union in bargaining with the Company. The present agreement between the Company and the Union became effective on May 16, 1963 and its term extends until September 15, 1965. Membership in the Union is a matter of your own free choice subject to the following requirements of the agreement:

1. If you are a member of the Union on the 30th day after you were hired or transferred into such unit, or if you choose at a later time to become a member of the Union, you must thereafter keep your Union membership in good standing throughout the remaining period of the existing agreement between the Company and the Union and any renewal of the agreement, as a required condition of your continued employment by the Company in such unit.

2. If you are not a member of the Union on the 30th day after you were hired or transferred into such unit, you then have the right to choose not to become a member of the Union but such right can be exercised in the following manner, only:

(a) You must mail a letter to the Union within the ten-day period that begins with the 31st day after you were hired or transferred into the unit and ends at the close of the 40th day after the date of such hire or transfer.

(b) The letter must state that you do not desire to become a member of the Union or contain some other statement that reasonably conveys that meaning. The letter should be signed legibly with your full name. The letter must be mailed within the same ten-day period referred to above, by certified or registered mail. The letter and the envelope in

which it is sent must be addressed to the Union as follows:

Aeronautical Industrial District Lodge 751
International Association of Machinists AFL-CIO
5502 Airport Way South
Seattle 25, Washington

(c) A copy of the letter must be mailed to the Company within the same ten-day period, by certified or registered mail, in an envelope addressed as follows:

The Boeing Company
Corporate Labor Relations Office
Mail Stop 10-11
P. O. Box 3707
Seattle 24, Washington

If you do not write the letter and send the copy within the time and in the manner specified above in (a), (b) and (c), you will then be required to become a member of the Union as a condition of your continued employment by the Company in such unit.

3. Employee members of the Union who are within the collective bargaining unit referred to above, whose services with the Company are terminated under the existing agreement for any reason, and who later are reemployed or reinstated under the agreement shall, not later than the 31st day following such date of reemployment or reinstatement, reestablish and continue their membership in good standing in the Union as a condition of continued employment.

THE BOEING COMPANY

(SECOND NOTICE)

NOTICE TO THOSE RECENTLY HIRED OR TRANSFERRED INTO CERTAIN PRODUCTION AND MAINTENANCE JOBS

(Union Membership Requirements—Seattle-Renton Hourly Production and Maintenance Unit Represented by Lodge 751 including Remote Locations that are part of such Unit)

When you were recently hired (or transferred) into your present employment, you were handed a notice that informed you as to certain of your privileges, rights and obligations regarding union membership.

Paragraph 1 of the first notice told you of your obligation to maintain union membership if you are a member of the Union on or after the 30th day following the date you were hired or transferred into your present employment.

Paragraph 2 of the first notice told you what you have to do and the ten-day period within which you have to do it, if you choose not to become a member of the Union. Your ten-day period is from ..... to ..... both dates inclusive.

A copy of the first notice is attached.

THE BOEING COMPANY

Attachment: Copy of First Notice

[G.C. EX. 30]

BOOSTER LODGE NO. 405

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

Post Office Box 29248
New Orleans, Louisiana 70129

FIRST IAM AEROSPACE LODGE

AREA CODE 504 254-0830

September 10, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. J. H. Brewer
4737 Papania Drive
New Orleans, La.

Dear Mr. Brewer:

Within the next two weeks our attorneys will file suit in court for the collection of fines levied against members and/or ex-members as a result of their actions during the strike in 1965.

Since you were granted clemency in your particular trial, we wish to offer this final opportunity for you to pay your reduced fine. Contact the union office either in person or by telephone prior to September 25, 1968 to let us know of your intentions. Failure to contact us will automatically increase your fine to $450.00 as was stated at the time of your trial.

Fraternally,

/s/ Donald C. Verigan
DONALD C. VERIGAN,
President

[CHARGING PARTY EXH. 1.]

THE SPACE TRAVELER 405

LOCAL LODGE 405

VOL. 1 NO. 8

OCTOBER 13, 1965

BOEING CONTRACT IMPROVEMENTS

The Company has offered a Savings Plan wherein an employee can save from 1 to 5% of his salary. The Company will contribute an amount equal to 50% of the employees savings.

They are also going to change the employees sick leave, severance hours of credit into cash by multiplying his hours of credit by his current wage rate including any shift differential. A trustee will invest the funds contributed to the plan in a balanced portfolio of equity and fixed income securities. The employee can withdraw money equal to any reduction in earnings suffered because of a sickness.

Roger E. Hilton
President

THE STRIKE IS OVER!

Now that everyone is back at work, the question was asked, "who won?" The only answer that I can give is that no one wins a strike; Company nor Union.

Was the Strike worth it? Yes, because we made gains in our working conditions and benefits that we would not have today if the working men and women weren't willing to fight for their rightful share of the company's profit and to insist on decent working conditions. Today, we are reaping the benefits our fathers and grandfathers fought for and won. They accomplished this by the same method we used—by striking a company whom we felt was not willing to give us a fair share. Without laboring men and women, no company can exist.

I wish to take this opportunity to thank the 90% of the Bargaining Unit who fought for the Contract for all employees of the Boeing Company. The 10% who worked behind the lines, commonly called SCABS, must have a guilty conscience to accept the gains won by others!

Harold E. Higgins, Jr.
Business Representative

Our Mailing List Is Accurate and Up-To-Date For Union Members Only

Be sure to read this edition and pass your paper on to "someone listed" and "you know who", so that they will know that WE KNOW.

Dependent Insurance

I have heard many members complain that after the strike was over and we went back to work, we had gained so little above the Company's original offer, that we would have been better off if we had not been on strike for the 13 working days.

I would like to point out a fact that it seems many of our members have overlooked. Dependent insurance coverage. Nationwide, over 80% of our members who work for Boeing and have dependents who could be covered by dependent insurance. The Company has now agreed to pay a part of the cost of this insurance. $7.50 a month for the first 2 years and $10.00 a month the third year. Without the strike, the company would not have agreed to pay this, and they did not until we were forced to go on strike.

I wonder how many of you have figured out what this means to us in dollars over the 3 year contract. Look over the following figures and you will see what this is actually worth to each of us, and how it compares with any money lost while on strike. Each person with dependents will get $300.00 from the Company for insurance during the 3 years of this contract. A Grade 10 lost $245.96 in wages during the strike. Grade A lost $389.48. The average amount lost was about $295.00, but we picked up $300.00 on dependent insurance. It also was a wedge which may enable us to get the company to pay full cost of dependent insurance on the next contract.

Gene P. Griffith
Secretary-Treasurer

Personality Analysis

The Report Card days are about over, except for those employees who are hired, recalled, or reclassified to a new job title and who have not held a rating during the preceding year. This means that an employee will maintain his

present group rating which he received on or before September 15, 1965.

This will only exist for the duration of the 6 month transitional period requested by the Company. The Negotiation Committee of the Union will meet with the Company during this 6 month period to negotiate a new system, acceptable to both the Company and the Union, or we will exercise our preserved right to strike on this issue.

Editor

Hurricane Betsy

Many, many thanks have been extended to our membership here in Local 405 for the much needed help that "Betsy" victims have received. The participation given to help these people has been received with gratitude beyond words.

The Hurricane Betsy Relief Committee has been set up, consisting of Vern McKimmey, GLR, Norman Prior, Grand Lodge Auditor, John Whalen, Jr., Business Representative of Lodge 37, and Harold Higgins, Business Representative for Lodge 405.

All money contributed is to go directly to those who suffered through storm and flood loss, and are not covered by insurance. All donations are to be forwarded to Matthew DeMore, General Secretary-Treasurer, IAM & AW, 1300 Connecticut Avenue, Washington, D. C.

If you are one of these victims, or know of someone who is, contact this office, 254-0880, and give us the name, address, and phone number.

V. E. McKimmey
Grand Lodge Representative

Smoking

The privilege of smoking has been extended to the employees of Boeing, Michoud, that other company's have been enjoying for 3 years. All members should be conscious of the fact that even though we are now smoking, it is not right to smoke in dangerous or clean areas.

Attempts are being made by the Union to furnish sufficient ash trays and it will be to our advantage to dispose of all cigarette butts in the proper containers.

Special Thanks

The Office Secretaries, Joy and Jan, want to especially thank those members who worked "above and beyond the call of duty" helping them in the office, etc. Don Verigan, Bob Sanders, Harry Downs, Sue Curtis, John Haase, Don Shelton, Carrol Gross, Carol Tingey, and James Lewallen, etc. Many thanks for your kind and willing help.

Jan and Joy

Next Regular Meeting

The regular monthly meeting will be held on Saturday, October 16th, at 10:00 A.M.

The present jackpot is now up to $60.00. A member must be present and sign the roster to claim the winnings if his name is drawn from the Union member roster.

Come to the meeting! Maybe your name will be drawn!

Thus Saith The Lord

"It is written, man shall not live by bread alone, but by every word that proceedeth out of the mouth of God."

Matthew 4:4

As surely as bread is the staff of life, so surely does man need to read, know, and take into his spiritual being, the word of God if he is to live the *full* life.

The word of God has been the subject of the artist, musician, architect, farmer, builder, and all men of every trade. Heed it and life becomes worth living. Ignore it and hell would be pleasant compared to the empty life we would live.

The only way to talk to Our Heavenly Father is in humble prayer and He will talk with us through His written word. Read it to be wise, keep it to be strong, and believe it to be saved.

Harry Downs
Member

Well Worth Mentioning

We certainly wish to extend our thanks to our Local President, Roger Hilton, for a job we feel was well done in

the Boeing-Union, Seattle, Washington negotiations covering the much needed demands we received as a result of our 19 day strike by the members. Also, an excellent job was den by our B.R., "Bud" Higgins, GLR Vern McKimmey, and the Officers of this Local. Again, our thanks.

L. J. Ayliffe, Jr.
Editor

Appointment

Harold E. Higgins, Jr. Business Representative of Local 405 has been appointed to the Advisory Board of Delgado Trades School by Mayor Victor H. Schiro. He will be representing Labor on this board.

This appointment has proven that Labor has taken its place in the field of education.

Real Facts on Nationwide Strike

Members of the IAM & AW at installations of the Boeing Company, including the following principal locations:

Location	Bargaining Unit Size
Seattle—751	28,000
Wichita—834	7,000
Michoud—405	2,000
Cape Kennedy—2061	380

Also, other isolated locations.

WE SHALL NOT FORGET!!!

The following names listed below are many of the wage hourly employees who allegedly crossed the Picket Line and/or wrote letters for termination of their membership in the IAM & AW during the 19 day strike period:

Abbott, Carmen
Adams, Guy T.
Acosta, A. J.
Adams, Wm. M.
Anderson, Clifford
Anzalone, I.
Arreteig, J. B. Jr.
Arthur, Ronald
Bailey, R. D.
Aragon, J. C.
Barron, H. H.
Bauer, W. P.
Beard, R. J.
Bearden, David D.
Benge, B. J.
Bengs, H. E. Jr.
Benshoof, W. A.
Bentley, J. W.
Blair, B. J.
Blevins, J. E.
Bloom, Marie
Bondio, Sal
Bordelon, Kathleen
Boyd, Betty A.
Boyd, J. L.
Branyon, J. D.
Breland, V. A.
Brewer, J. H.
Bringer, M. L.
Brown, Caroline
Brown, James E.
Brown, Robert L.
Brown, Roland B.
Buchanan, B. O.
Budd, E. P.
Burr, Marvin L.
Butler, D. C., II
Butler, W. E.
Byrne, E. J., Jr.
Carey, J. W., Jr.
Caruso, Bernard C.
Caruso, V. B.
Cascio, A. J.
Chamblee, R. F. Jr.
Chouest, A. M.
Ciko, Michael A.
Clark, Ardith
Clark, Kathryn H.
Clark, Richard
Claude, A. J.
Clements, Ersler
Cole, Eleanor E.
Cole, Estie L.
Conforto, Joseph D.
Conniff, J. T.
Copeland, Andre M.
Coy, T. A.
Craig, V. T.
Crawford, John J.
Crosby, W. R.
Crouse, R. B.
Crusto, Wilma M.
Cuevas, T. G.
Culbertson, Eugene F.
Cullen, R. L.
Curulla, Virginia
Delaup, G. J.
Delcambre, Francis
Dubuque, A. E.
Durand, R. J. IV
Duskin, P. J.
Dutruch, Birdie B.
Elliot, James R.
Ellis, G. R.
Ellis, R. E.
Ennis, Henry Jr.
Epperly, Sherman E.
Fahrenbacher, D.
Fahrenbacher, R.
Flubacher, M. T.
Fradella, J. J.
Fradella, Wm. H.
Franchez, L. P.*
Frayle, Anthony
Fritz, K. P. J.
Fye, Harry

Gagliano, A. J.
Gagliano, L. C.
Gange, Peter
Garcia, Anthony P.
Giardina, P. W.
Gibbs, W. L.
Gilbert, J. W. II
Gilbert, Peggy
Gomez, Peter
Gray, J. H.
Green, Colleen C.
Green, E. L.
Green J. H. Jr.
Groat, R. E.
Hale, R. J.
Hall, H. D.
Hamaker, R. P., Jr.
Hamilton, L. F. Jr.
Harding, Robert H.
Harney, Glenn
Haskins, Albert F.
Haydel, L. D.
Herzog, Haskel
Hidalgo, Vernon
Higginbotham, F. L.
Hilton, Mary E.
Himes, L. L.
Hines, C. L.
Hodges, Donna
Hoffman, A. M.
Holloway, R. C.
Hooks, Shirley A.
Hope, Jessie
Howard, Fay
Howard, William
Houin, Jeffrey
Hull, Irene
Irvin, Algy
Jacobs, H. J.
James, N. C.
Jasper, Peter
Johnson, Gary
Jones, Ora Mae
Kahmeyer, D. M.
Katz, Harry
Keim, M. F.
Kelley, W. R.
Kendrick, Eloise
Killough, D. B.
King, Francis
Kirk, E. F.
Komara, Richard T.
Kops, M. J.
Koser, E. C.
Kreger, Jerry R.
Lack, D. H.
Lacombe, Dallas J. Jr.
Lanasa, Mary E.
Landreaux, Jewel
Landry, R. P.
Leeson, Ronald E.
Lefort, Charles
Levins, Arlen
Lilly, W.
Lipscomb, Ruby
Little, Arlene
Littlejohn, S. M.
Logan, W. B.
Lombard, W. W.
Lott, Carolyn
Lott, Harvey L. Jr.
Lowenthal, Jerome
McAmis, Larry
McCollum, Kenneth
McFadden, Leland J.
McFarland, Clarence
McGee, Charles
McHenry, Carl R.
Martin, Evelyn
Martz, J. L.
Mathews, Raymond D.
Melancon, Warren A.
Meriwether, David H.
Messmer, Jonny B.
Miller, A. D.
Miller, Cheryl D.
Mobley, C. R. Jr.
Morgan, Caroll S.
Mortillaro, Sal A.
Moser, J. D. C.
Mullen, I. J. II
Mullins, Ollie J.
Murray, R. L.
Myrick, C. T.*
Newman, C. L.
Newman, W. F.
Nicolosi, E. B.
Nugent, J. I.
Nungesser, D. F.
O'Neal, R. B.
Ouellette, J. F.
Pangle, J.
Parker, G. L.

Parker, Mary V.
Perdue, G. W.
Phillips, H. G.
Pincoffs, John G.
Pope, B. Joyce
Powell, L. P.
Rahrich, R. J.
Rakes, Marvin E.
Ratzel, Susan A.
Rayburn, Gloria D.
Reed, Kathleen
Richards, A. J.
Robinette, Joachim Jr.
Robinson, Billy
Rodriguez, D. R.
Runft, Eleanora
Russell, W. H. Jr.
Rydyewski, A. J.
Sadler, Wm. H.
Saucier, E. V.
Schaff, D. III
Schroader, Leonard E.
Scipione, R. A.
Scales, Betty J.
Scales, Walter E.
Shelby, Alice M.
Shewmake, Oliva
Sloan, John S.
Sloan, Theresa N.
Smith, Alan L.
Smith, Riley
Smith, Tommy W.
Smith, Wm. R.
Stanton, J. G.
Staub, L. H.
Stender, P. G.
Sterling, L. L.
Stevenson, Glen
Stirling, Robert
Stone, J. W. Jr.
Stout, J. A.
Tatum, W. L.
Taylor, M.
Thomas, Gladys I.
Thomas, Robert
Thompson, Dorothy M.
Tiller, C. R.
Tiller, K. J.
Timmons, Shannon
Travis, D. R.
Travis, Lillian G.
Trotter, William
Trotter, Wilbur
Tucker, Jerry F.
Vinson, Ann M.
Wagner, D. R.
Walker, J. R.
Warner, R. A., Jr.
Wentz, F. R.
Whiting, Clinton
Williams, Douglas F.
Williams, George
Williams, Gwendell
Williams, Viola L.
Wilson, Roy H.
Windmann, C. C.
Wood, D. R.
Yarbrough, T. L.

* These men worked one day, September 16th, but supported the strike fully after this date.

If your name was on this list in error, come to the Union Office and upon presentation of proof that you did not work by crossing the picket line, or that you did not ask for termination from the Union and we will publish the correction. We understand that some of the members listed above who wrote for termination of membership have since signed an application for reinstatement.

SEE YOU NEXT MEETING

SATURDAY, OCTOBER 16, 1965

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS
LOCAL LODGE #405
OFFICIAL PUBLICATION

Lloyd J. Ayliffe, Jr.
Editor

Local Lodge #405, IAM & AW
Post Office Box 29248
New Orleans, Louisiana 70129

Non-Profit Organization
PAID
New Orleans, Louisiana
Permit No. 720

Local Lodge #405, IAM & AW
Post Office Box 29248
New Orleans, Louisiana 70129

Non-Profit Organization
PAID
New Orleans, Louisiana
Permit No. 720

[Charging Party's Exhibit No. 2]

BOOSTER LODGE No. 405

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS

Post Office Box 29248
New Orleans, Louisiana 70129

FIRST IAM AEROSPACE LODGE

AREA CODE 504
254-0880
December 10, 1965

Mr. John E. Nau
Labor Relations Representative
The Boeing Company
Post Office Box 29100
New Orleans, Louisiana 70129

Dear Sir:

According to our records, the following employees have not kept their membership in good standing in the Union in accordance with Article III, Section A, Paragraph 1 and 3, of the Current Collective Bargaining Agreement.

Fradella, J. J.	8154	Staub, L. H., Jr.	5499
Haydel, L. D.	1740	Stout, J. A.	0947
Landreaux, J. G.	6910	Taylor, M., Sr.	1188
Lombard, W. W.	6323	Travis, L. G.	9661
Nungesser, D. F.	1609	Tucker, J. F.	1385
Shelby, A. M.	6850	Windmann, C. C.	5333
Smith, T. W.	3064		

Your attention in this matter will be appreciated.

Yours very truly,
Harold E. Higgins, Jr.
Business Representative
Local Lodge 405

[CHARGING PARTY EXH. 3]

BOOSTER LODGE NO. 405

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS

Post Office Box 29248
New Orleans, Louisiana 70129

FIRST IAM AEROSPACE LODGE

AREA CODE 504
254-0880
January 6, 1966

Mr. John E. Nau
Labor Relations Representative
The Boeing Company
Post Office Box 29100
New Orleans, Louisiana 70129

Dear Sir:

According to Article III, Section A of the Current Collective Bargaining Agreement, an employee must maintain his membership in the Union in good standing. If the employee does not, the company will advise the employee that his employment status with the company is in jeopardy, and that his failure to meet his membership obligations with the Union within five (5) days will result in his termination of employment.

We are writing to ask that you notify the employees listed on the attached lists that their jobs are in jeopardy and they must meet their membership obligations with the Union within five (5) days.

Thanking you in advance, I remain,

Yours very truly,

/s/ Harold E. Higgins, Jr.
HAROLD E. HIGGINS, JR.
Business Representative
Local Lodge #405, IAMAW

Carmen Abbott	6646	Perry Duskin	9110
Ronald Achee	4479	James R. Elliot	3638
Abel Acosta	2676	Rodger Ellis	0125
William Adams	6940	Henry Ennis, Jr.	2017
Clifford Anderson	3698	S. E. Epperley	1973
Ignatioius Anzalone	6520	Dorothea Fahrenbacher	6898
John C. Argon	9839	Marie Flubacher	1719
John Arretteig, Jr.	2355	William Fradella	3914
Richard Bailey	1876	Anthony Frayle	7647
Howard Barron	2590	Harry Fye	4462
William Bauer	9297	Alfred Gagliano	5864
Raymond Beard	8369	Louis Gagliano	3593
Harold Bengs, Jr.	4865	Anthony Garcia	8984
James W. Bentley	5378	Philip Giardina	8974
Bernard Blair	9040	Eldon L. Green	8722
James Blevins	0520	Robert E. Groat	9027
Kathleen Bordelon	8863	Malcolm Guedry	4169
Betty Ann Boyd	2132	Robert J. Hale	6490
John Branyon	2825	Herbert D. Hall	1408
Vernon Breland	4718	Louis F. Hamilton, Jr.	1021
Joseph Brewer	1857	Robert H. Harding	9446
Melvin Bringer	6913	Glenn A. Harney	0270
Roland Brown	0955	Vernon Hidalgo	2819
Edward P. Budd	9958	Mary E. Hilton	0951
G. L. Burgau	1089	Lenie L. Himes	7681
Marvin Burr	2340	Donna L. Caruso	5405
David G. Butler, II	0391	Arthur Hoffman	8483
Edward Byrne, Jr.	0683	Roggie Q. Holloway	7214
Joseph W. Carey, Jr.	0703	Shirley A. Hooks	5264
Bernard C. Caruso	8876	Jesse R. Hope	0807
Vincent Caruso	8671	Jeffrey C. Houin	2173
August J. Cascio	2789	Fay C. Howard	3670
Adam M. Chouest	2265	Harry J. Jacobs	7425
Ardith Clark	8803	Nunzy C. James	7802
Ersler Clements	9535	Peter P. Jasper	0242
Estie L. Cole	7163	Dale M. Kahmeyer	7223
John Conniff	0947	Harry Katz	3687
Andre Copeland	3901	Dan B. Killough	2601
James Cothern	3176	Francis J. King	0302
Frank Cowen	0137	Eugene F. Kirk	6878
Thomas A. Coy	5847	Murray J. Kops	8981
Vernon T. Craig	8915	Jerry R. Kreger	9288
Wayne Crosby	1723	Darrell H. Lack	0147
Wilma Crusto	3635	Dallas J. Lacombe	9823
Thomas G. Cuevas	7757	Mary E. Lanasa	5405
Eugene Culbertson	6674	Ronald P. Landry	1112
Robert L. Cullen	6727	Lloyd E. Lazard	5810
V. M. Curulla	1189	Terry W. Lee	9472
Gerald Delaup	4140	Ronald E. Leeson	2282
Francis Delcambre	9082	Arlin Levins	8536
Arthur E. Dubuqye	1968	Willis A. Lilly	2126
Ralph Durand IV	3415	Ruby Lipscomb	3600

Arlene Little	2594	Delton R. Rodriguez	3927
Shirley M. Littlejohn	8362	Eleanora Runft	6035
Woodward B. Logan	0169	William H. Russell, Jr.	4906
Carolyn Lott	0046	William H. Sadler	2648
Evelyn Martin	7050	Earl V. Saucier	4612
Joe Leroy Martz	3117	Denis Schaff, III	8965
Raymond Mathews	0164	Ronald A. Scipione	6544
Charles D. McGee	7486	Alan L. Smith	2664
David Meriwether	5546	Riley Smith	1147
Cherly D. Miller	8101	William R. Smith, Jr.	6158
Carroll S. Morgan	7909	James G. Stanton	1856
J. D. Chris Moser	1011	Paul G. Stender	4590
James Mullen, II	4994	Louis L. Sterling	8155
William Newman	3930	Glenn L. Stevenson	0947
E. Belle Nicolosi	6509	Robert B. Stirling	4028
James I. Nugent, Jr.	5402	John W. Stone, Jr.	0678
Richard B. O'Neal	4870	Winefred L. Tatum	4830
J. F. Ouellette	4210	Gladys I. Thomas	6383
Jimmy W. Pangle	4991	Charles R. Tiller	9389
Mary V. Parker	8684	Karen J. Tiller	9355
Henry C. Phillips	4978	Shannon F. Timmons	0490
John G. Pincoffs	8531	William Trotter	6511
Ronald L. Polson	1490	Richard A. Warner, Jr.	1449
B. Joy Pope	8376	Clinton M. Whiting	8837
Louis P. Powell	1974	Douglas F. Williams	9045
Marvin E. Rakes	3126	George F. Williams	3159
Gloria D. Rayburn	1747	Roy H. Wilson	8372
Kathleen L. Reed	3233	Donald R. Wood	6700
A. J. Richards	4736	T. L. Yarbrough	4817
Billy J. Robinson	7937		

SUPREME COURT OF THE UNITED STATES

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER ALLOWING CERTIORARI. Filed December 18, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia. Circuit is granted. The case is consolidated with No. 71-1607 and a total of one and one-half hours is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 17-1607

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

THE BOEING COMPANY, ET AL.

ORDER ALLOWING CERTIORARI. Filed December 18, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 71-1417 and a total of one and one-half hours is allotted for oral argument.

☆ U.S. Government Printing Office: 1973—492-911/456

71-1417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
FILED
MAY 1 1972
MICHAEL RODAK, JR., CLERK

No.

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

—and—

THE BOEING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLATO E. PAPPS
LOUIS POULTON
1300 Connecticut Avenue, N.W.
Washington, D. C. 20036

BERNARD DUNAU
912 Dupont Circle Building, N.W.
Washington, D. C. 20036

C. PAUL BARKER
711 Carondelet Building
New Orleans, Louisiana 70130

Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MISCELLANEOUS:

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§ 7 2
§ 8(b)(1)(A) 2, 3, 7, 8, 9, 16, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

—and—

THE BOEING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, (the Union), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on March 14, 1972 (*infra,* p. 1a).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 79 LRRM 2443 (*infra*, pp. 5a-33a). The opinion of the National Labor Relations Board is reported at 185 NLRB No. 23 (*infra*, pp. 34a-45a). A companion opinion of the National Labor Relations Board is reported as *David O'Reilly*, 185 NLRB No. 23 (1970)[1] (*infra*, pp. 47a-58a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1972 (*infra*, p. 1a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation.

2. Whether the National Labor Relations Board is empowered to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking.

STATUTE INVOLVED

Section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C. § 151) and its proviso are at the statutory matrix of the controversy. Section 7 of the Act accords employees *inter alia* "the right to re-

[1] Petition for review pending before the Court of Appeals for the Ninth Circuit, *David O'Reilly* v. *N.L.R.B.*, No. 26,892.

frain" from "concerted activities for . . . mutual aid or protection." Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . . ." A proviso to this prohibition states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

STATEMENT

I. The Strike

The Boeing Company operates a plant at New Orleans, Louisiana, known as the Michoud plant (A. 3). The production and maintenance employees at this plant are represented in collective bargaining by the Union and its parent, International Association of Machinists and Aerospace Workers, AFL-CIO (IAMAW) (A. 3-4). A single employer-wide collective bargaining agreement covers IAMAW-represented units at the Michoud plant and at other facilities of the Company located elsewhere in the United States (*ibid.*) About 1,900 production and maintenance employees work at the Michoud plant (A. 67).

A collective bargaining agreement covering the IAMAW-represented units at the Michoud plant and other Company facilities was in effect from May 16, 1963 through September 15, 1965 (A. 66-67, 3). No accord upon new contract terms was reached upon expiration of the agreement (A. 67, 5). A lawful employer-wide strike over the economic issues in dispute, and picketing in support of the strike, began on September 16, 1965 and ended on October 3, 1965 (A. 67, 5; 85-86).

The strike was preceded by a union meeting at which a strike vote was taken (A. 105, 184, Tr. 21). The Constitution of the IAMAW provides that "a strike vote . . . shall be by secret ballot. In order to declare a strike, such vote must carry by a three-fourths majority of those present and qualified to vote" (G.C. ex. 5, Art. XVIII, sec. 2, p. 54). The Constitution further requires that no strike may be declared without the approval of the Executive Council of the IAMAW, except that, "In an extreme emergency, . . . the I.P. [International President] may authorize a strike pending the submission to and securing the approval of the E.C. [Executive Council]" (*Id.*, Art. XVIII, Secs. 1, 2, pp. 53-54). The By-Laws of the Union provide that, "The approval of a strike, method of declaring a strike, and the settlement of a strike shall be in accordance with applicable provisions of the IAM Constitution" (G.C. ex. 6, p. 4).

A new agreement was reached on October 3, 1965, retroactive to October 2 (A. 67, 5; 85-86). The strike and picketing, which lasted eighteen days, embraced the Michoud plant (A. 67, 5, 25, n. 28).

II. The Imposition of Fines for Strikebreaking

The Constitution of the IAMAW defines "improper conduct of a member" and establishes a full trial and appellate procedure to determine the existence and punishment of alleged offenses (A. 214-218). Among the offenses defined as misconduct of a member is "Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission" (A. 6; 214). The Constitution provides that this offense, like other "actions or omissions" constituting "misconduct

by a member," shall "warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing . . ." (A. 68, 5-6; 214). Disqualification from holding office for a period not exceeding five years is expressly enumerated as a penalty (A. 216).

Some 143 production and maintenance employees, who were members of the Union when the strike began, crossed the picket line and worked at the Michoud plant during all or part of the period of the strike (A. 67, 5). Some 24 of these strikebreakers made no attempt to resign from the Union during the strike period (A. 67). The remaining 119 strikebreakers did resign from the Union during the strike period (A. 67-68). Of these 119, 61 resigned from the Union and returned to work *subsequent* to their resignation, and 58 resigned from the Union but returned to work *before* their resignation (A. 67).

The Union tried all employees who were members of the Union when the strike began who were known to have worked during the strike, and assessed a penalty against each found guilty of strikebreaking, without regard to whether the accused had resigned from the Union during the strike period or had started to work subsequent to his resignation (A. 3, 13 and n. 11; 198-200). The proceedings resulted in a "Not Guilty" verdict as to two accused, a "No Fine" disposition as to a third, and a "Mistrial" without retrial as to a fourth (A. 239, 127). The remaining accused were found guilty of strikebreaking but a different penalty was assessed against a particular accused depending upon the class within which he fell. Those accused

who appeared before the trial committee, apologized, and pledged loyalty to the Union were in effect fined fifty percent of their strikebreaking earnings and disqualified from holding union office for varying periods (A. 68, 7; 188-189, 204-205). Those accused who did not appear for trial and were found guilty were fined $450 and disqualified from holding office for five years (A. 68, 6-7; 193).

The full $450 fine was assessed against 108 individuals, and the 50-percent-of-strikebreaking-earnings fine against 35 individuals (A. 67, n. 3). All were informed of their right to appeal the decision to the International President of the IAMAW (A. 7, n. 4; 229-230). No appeals were taken (A. 7, n. 4).

Payment of the fines has followed a checkered course. No $450 fine has been paid (A. 68). Reduced fines have been paid in full in eighteen instances and in part in three instances (A. 68; 238, 127). Payments have averaged $40 (A. 68; 205-206), and payments in full have ranged from a low of $10, a mid-point of $54.80, and a high of $120 (A. 238-239, 127). The Union has warned individuals that failure to pay would result in commencement of suit against them (A. 68-69, 7-8; 231-233, 71, 72). Suit has been instituted against nine individuals in local courts to recover the $450 fine assessed against each (A. 69, 8; 210-212, 240-241). The Company has undertaken the defense of these suits (A. 5). The outcome of the suits has not been determined (A. 69).

III. The Board's Decision

The claim before the Board was that the Union restrained or coerced employees in the exercise of their right to refrain from concerted activity for mutual aid

or protection in violation of Section 8(b)(1)(A) of the Act. The claim divided into two parts. First, although the Union's rule against strikebreaking is valid, the Union violated Section 8(b)(1)(A) by fining its members in an *unreasonably* large amount for violation of the rule, and by seeking or threatening to seek collection of that allegedly unreasonable fine by court action. Second, independently of the reasonableness of the fine, the Union violated Section 8(b)(1)(A) by fining in any amount those persons who had resigned from the Union for that strikebreaking activity in which they engaged *subsequent* to their resignation.

The first claim—the reasonableness of the fine—was dismissed by the Board (*infra*, p. 42a, n. 16). It relied for its rationale on its decision in *David O'Reilly*, 185 NLRB No. 22 (*infra*, pp. 47a-58a), which it issued on the same day as the opinion in this case. In *David O'Reilly*, one member dissenting, the Board held that, given the settled validity of a rule requiring members "to honor an authorized picket line" and the settled permissibility of punishing breach of the rule by "union fines (or court enforcement of same)", Congress did not intend "to have the Board regulate the size of these fines and establish standards with respect to their reasonableness" (*infra*, p. 55a). Rather, related as it is to "the fairness of union discipline meted out to protect a legitimate union interest" (*infra*, pp. 57a-58a), the issue of the reasonableness of a fine is to be determined by a court in a proceeding to collect or set aside the fine. The "local courts are the more logical tribunals for the establishment of standards of reasonableness" (*infra*, p. 55a).

The Board, one member dissenting, decided the second claim—pertaining to the situation of a person

who had resigned from the Union—in favor of the view that the Union violated Section 8(b)(1)(A) by fining a person who had resigned from membership for engaging in strikebreaking *subsequent* to his resignation. The premise of the Board's decision is that, while a member is bound to observe his union's valid rules during his period of membership, "the contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished" (*infra*, pp. 39a-40a). Accordingly, the Union "violated Section 8(b)(1)(A) of the Act by imposing disciplinary fines upon resigners from its ranks, for acts committed after their resignations" (*infra*, p. 42a). However, as to those resigners who engaged in strikebreaking *before* their resignation, the Union retained "the right to discipline the employees for prior strikebreaking. The effect of these employees' resignations was only to extinguish the Union's future authority over them" (*infra*, p. 43a).

IV. The Decision of the Court of Appeals

The Court of Appeals, in agreement with the Board, affirmed its conclusion that "the Union violated Section 8(b)(1)(A) of the N.L.R.A. by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage" (*infra*, p. 21a). However, in disagreement with the Board, the Court of Appeals held that "it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised" (*infra*, p. 25a), and it directed the Board on

remand to determine "the questions relating to the reasonableness of the fines imposed by the Union" (*infra*, p. 33a).

REASONS FOR GRANTING THE WRIT

On August 27, 1970, in companion cases, the Board decided two important and interrelated questions concerning the scope of Section 8(b)(1)(A) of the National Labor Relations Act and its proviso. In this case it decided that a union may not levy a court-collectible fine for postresignation strikebreaking upon a person who had been a member of the union when the strike began but who resigned during the strike. In *David O'Reilly*, 185 NLRB No. 23 (1970), it decided that it was without power to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking (*infra*, pp. 47a-58a). The Board applied its *O'Reilly* determination in this case. This case, accordingly, presents both branches of the Board's companion holdings, namely, that a union may not levy a fine for postresignation strikebreaking and that the Board is without power to determine the reasonableness of a fine assessed for preresignation strikebreaking.

The Board supported both holdings in reliance upon its understanding of this Court's three decisions interpreting the scope of Section 8(b)(1)(A) and its proviso (*infra*, pp. 39a-42a, 52a-56a). *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *N.L.R.B.* v. *Marine and Shipbuilding Workers*, 391 U.S. 418 (1968); *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969). As the Court of Appeals saw it, the Board had wrongly read this Court's decisions on the preresignation issue (*infra*, pp. 23a-25a), but had rightly read the same de-

cisions on the postresignation issue (*infra*, pp. 13a-17a). It therefore disagreed with the Board's preresignation holding but agreed with the Board's postresignation holding.

This Court should grant certiorari in this case to review both issues, important and recurrent in the administration of the Act, in the one case in which each is squarely presented.

I

On March 20, 1971, this Court granted certiorari to consider the postresignation issue in *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, October Term, 1971, No. 71-711. 40 U.S.L.W. 3455. As expressed by the Board in its petition, the question presented is whether "a union violates Section 8(b)(1)(A) of the National Labor Relations Act by fining employees who resigned from union membership and then returned to work during a lawful union-authorized strike, and by seeking judicial enforcement of the fines." But it is this case, not *Granite State*, which presents this question forthrightly and unequivocally, and it is in this case, not *Granite State*, in which the Board stated its rationale in support of its position.

In *Granite State*, in denying enforcement of the Board's order, the Court of Appeals for the First Circuit suggested that *Granite State* may be critically different from this case (*N.L.R.B.* v. *Granite State Joint Board*, 446 F.2d 369, 372, n. 5 (C.A. 1, 1971)):

> . . . [T]he *Boeing* case, *supra*, may be distinguishable on its facts since in *Boeing* the fines were authorized by a general provision in a union constitution, rather than by a specific decision of the

membership adopted in the context of a particular strike. In *Boeing* the Board emphasized that "the Union had not warned members about the possible imposition of disciplinary measures." Also, the *Boeing* opinion did not consider whether any of the employees who crossed the picket line had originally voted to support the strike.

In this case, the court below embraced the distinctions suggested by the First Circuit, and in reliance on them stated that "we believe that the [*Granite State*] decision is inapposite to the present fact situation" (*infra*, p. 18a). It reasoned that (*infra*, pp. 18a-19a):

> Although the court in *Granite State* upheld the right of the union involved to impose fines on strikebreakers for post-resignation activity, it emphasized that a specific set of facts was present which it believed rendered such a result equitable, and it specifically recognized that these considerations were not present with respect to the instant Booster Lodge 405 case. In *Granite State,* the Board conceded that all of the fined employees had voted in favor of the strike in question. It is also important to note that the fines had not been imposed pursuant to a general provision in the union constitution, as here, but rather in accordance with a specific proclamation which had been unanimously adopted by the membership after the work stoppage commenced. *See* 446 F.2d at 370, 372 n. 5. Furthermore, all of those who were disciplined in *Granite State* had been expressly prewarned of possible punishment for strikebreaking, while the employees with whom we are herein concerned received no such pre-strikebreaking notification. Because of these distinguishing facts, we refuse to apply the rationale of *Granite State* to the instant factual situation. The strong equities which weighed in favor of the union there,

> are clearly not present here. In fact, their very absence powerfully supports the result which we have accepted.

The First Circuit thus holds, and the District of Columbia Circuit does not disagree, that a member despite his resignation is bound to refrain from strike-breaking for the duration of a strike when at the outset of the strike he made his own *individual* decision to go out on strike. But the issue which the Board presents, which the District of Columbia Circuit decides, and which the First Circuit reserves, is whether a member is bound by the *institutional* decision to strike whether or not he was individually opposed to that group decision. The District of Columbia Circuit holds that a member by resigning may renounce the institutional decision to strike at least in the absence of a showing that he individually assented to the decision initially.

It is only this case, and not *Granite State,* which thus squarely presents the issue of whether or not a member is bound for the duration of the strike by the group decision to strike, whatever his own original personal choice, which he cannot escape by resigning. And it presents the issue in a situation which is typical of the way in which strike decisions are generally made. In this case, in order to authorize a strike, a strike vote by secret ballot was mandatory, a three-fourths majority vote in favor of the strike was necessary to call the strike, and the strike call was further dependent on having the sanction of the Executive Council of the International Union (*supra,* p. 4). As thus presented in this typical posture, the heart of the question is whether the minority is bound by the majority's choice. Central to the answer is the indis-

pensability to effective labor action of binding the entirety of the members for the duration of the strike to the institutional decision to strike that the majority has made. And the essence of a secret ballot is its secrecy, a secrecy which the District of Columbia Circuit requires be broken if effect is to be given to its notion that a member is bound by the institutional decision only if he himself individually favored it when it was made.

While the First Circuit suggested the distinctions between this case and *Granite State,* it explicitly stated that "[w]e express no opinion, however, as to whether these distinctions are determinative" (446 F.2d at 372, n. 5, see also *id.* at 374, n. 8). The District of Columbia Circuit in this case, while purporting to rest on the distinctions that the First Circuit identified, nevertheless noted that "[t]o the extent that the First Circuit's decision in *Granite State* may be read to support Booster Lodge 405's position here, we respectfully decline to follow it" (*infra,* p. 19a, n. 19). Subsequent to both decisions the Court of Appeals for the Fifth Circuit rejected the Board's application of its postresignation holding to the levy of a fine in which the sole sanction for nonpayment was debarment from union membership. *Local 1255, IAMAW* v. *N.L.R.B.,* 79 LRRM 2787, March 15, 1972, *infra,* pp. 68a-73a. The Fifth Circuit noted that "[t]o the extent that [the District of Columbia Circuit's decision in] *Boeing* may be read to support the Board's position that all forms of discipline for postresignation picket-line-crossing are barred by the Act, we respectfully decline to follow it" (*infra,* p. 71a, n. 1).

This Court should grant certiorari in this case and set it for argument together with *Granite State* so that

the postresignation issue will be before the Court in its entirety in an unequivocal, typical, and fully-developed posture. Sound and informed decision will be enhanced by having before the Court the very case in which the Board expressed its rationale and which presents the issue in straightforward fashion. *Granite State* alone does not present the fact situation which the Court must address if the heart of the question is to be reached and decided.

II

The Board holds, but the Court of Appeals disagrees, that the Board is without power to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strike-breaking. The question of the power of the Board to determine the reasonableness of a union fine levied to enforce a valid union rule is important and recurrent.[2] Were the Board held to have this power the

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[2] Its recurrence is patent. *Milwaukee Printing Pressmen Union No. 7*, 192 NLRB No. 122, 78 LRRM 1047 (1971); *Passaic Printing Pressmen's Union No. 60*, 190 NLRB No. 38, 77 LRRM 1199 (1971); *International Association of Machinists, Oakland Lodge No. 284*, 190 NLRB No. 32, 77 LRRM 1100 (1971), review pending *sub nom.*, *Morton Salt Co.* v. *N.L.R.B.*, C.A. 9, No. 71-1853; *Communications Workers of America, Local 6135*, 188 NLRB No. 144, 76 LRRM 1635 (1971); *International Chemical Workers Union, Local 143*, 188 NLRB No. 100, 76 LRRM (1971); *Communication Workers of America, Local 9511*, 188 NLRB No. 63, 76 LRRM 1324 (1971); *United Construction Workers, Local 10*, 187 NLRB No. 99, 76 LRRM 1121 (1971); *Washington-Baltimore Newspaper Guild, Local 35*, 186 NLRB No. 133, 75 LRRM 1438 (1970); *Communication Workers of America, Local 2100*, 186 NLRB No. 132, 75 LRRM 1441 (1970); *United Rubber Workers of America, Local 510*, 186 NLRB No. 106, 75 LRRM 1420 (1970); *Communication Workers of America*, 186 NLRB No. 50, 75 LRRM 1324 (1970).

determination of reasonableness would become a new but permanent part of the Board's business. Pending final determination of the existence or absence of power, and under the impetus of the decision below, unfair labor practice charges claiming unreasonableness will continue to be filed, with the NLRB General Counsel at a loss to know whether to dismiss the charge in reliance upon the Board's position or to entertain the charge in reliance upon the reversal by the court below. Uncertainty as to whether the Board is an appropriate forum similarly vexes both those persons who wish to prosecute and those who must defend against claims of unreasonableness. State courts will also be troubled by concern over the respective roles of the Board and the courts within this field, a concern not quieted by the observation of the court below that the "question of the extent to which union action for enforcement of disciplinary penalties is preempted by federal law is not before this court, and we intimate no view concerning the resolution of this complex issue" (*infra*, p. 25a, n. 30). It is therefore essential that this Court settle the question of the Board's power without delay.

1. The court below states that the Board's conclusion that it is without power "is based upon a clear misconception of the law and the Supreme Court's relevant decisions" (*infra*, p. 23a). For its view of the right reading of this Court's decisions it refers to this Court's advertence to a "reasonable fine" in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 183 (1967), and in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 428, 436 (1969) (*infra*, pp. 23a-25a). But the court below quite mistakes the meaning of the statements alluding to a "reasonable fine." These statements are

all referable to the conclusion in both *Allis-Chalmers* and *Scofield* that the *body* of Section 8(b)(1)(A) had not been violated and for that reason there was no need to rely on the *proviso*. It is the *proviso* which bars the Board from inquiry into the reasonableness of a union fine, and neither *Allis-Chalmers* nor *Scofield* addresses the interpretation of the *proviso* as a limitation upon the Board's power. It is essential that this Court clarify the meaning of its decisions.

2. To say that the Board is empowered to determine the reasonableness of a fine is to upset the existing allocation of function in overseeing the administration of union discipline. Reasonableness is a question for judicial determination under state law and the Labor Management Reporting and Disclosure Act. "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield*, 394 U.S. at 426, n. 3. ". . . [S]tate courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship'." *Allis-Chalmers*, 388 U.S. at 193, n. 32. "The reasonableness of the fines is a matter for the state court to determine . . . ." *U.O.P. Norplex* v. *N.L.R.B.*, 445 F.2d 155, 158 (C.A. 7, 1971). In short, except as entry into the field is narrowly required to determine whether a union rule offends a policy of the National Labor Relations Act, regulation of internal union affairs is a field from which Congress has excluded the Board. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 237-241 (1971).

To permit the Board to trespass on this field would entail intolerable risks of collision with state courts.

State courts regularly and routinely adjudicate the reasonableness of union fines.[3] Were the Board also empowered to determine this question, the Board in the same case might find a fine reasonable which a court might find unreasonable, or the Board might find a fine unreasonable which the court might find reasonable. Since both the Board and the court would be exercising independent jurisdiction, each as competent to act as the other, there would be no basis for according priority between them, nor would either be required to stay its hand in deference to the other. Each would operate concurrently and conflict in result would be resolved by the happenstance of which proceeding ended sooner in a determinative disposition.[4] And if conflict were not resolvable in this way it would not be resolvable at all short of decision by this Court. For the Board surely does not sit as a supervisory tribunal to review or displace judicial judgments. Nor should it sit as a supplementary tribunal additional to the courts to adjudicate claims arising from administration of internal union discipline.

The decision below thus dislocates the existing allocation of function, bringing the Board into the business allotted to the courts, and needlessly exacerbating state-federal relations.

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[3] *E.g. North Jersey Newspaper Guild Local No. 173* v. *Rakos*, 110 N.J. Super 77, 264 A.2d 453, 74 LRRM 2487 (N.J. Sup. Ct. App. Div. 1970); *L. A. Newspaper Guild, Local 69* v. *Armenta*, 73 LRRM 2078 (Cal. Sup. Ct. App. Dept. 1969); *Jost* v. *Communications Workers of America*, 91 Cal. Rep. 722, 64 CCH Lab. Cas. ¶ 52,469, p. 67,910 (Cal. Sup. Ct. App. Dept. 1970); *Walsh* v. *Communications Workers of America*, 271 A.2d 148, 75 LRRM 2629, 2632 (Md. Ct. of App. 1970).

[4] *Penn General Casualty Co.* v. *Pennsylvania*, 294 U.S. 189, 195 (1935); *Ballantine Books* v. *Capital Distributing Co.*, 302 F.2d 17, 19 (C.A. 2, 1962).

3. The decision below also upsets the statutory scheme of the National Labor Relations Act under which it is the Board's business to protect an employee's job rights but not his membership rights.

Short of invoking a union security agreement to require a member to pay his union dues and initiation fee, the "policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperilling their livelihood." *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40 (1954). The object of statutory solicitude is thus job rights. The employee is protected in his status as an employee against reprisal for engaging in or abstaining from concerted activity for mutual aid or protection. The function of the Board is to safeguard the employee for his protected action or inaction in his status as an employee—in getting a job from an employer, in keeping a job with his employer, in being compensated for his work by his employer, and in enjoying the other emoluments of his work granted by his employer.

That is one side of the coin. The other side is that, so long as the employee's status as an employee is left alone, the union may discipline the employee as a member for failure to perform a valid membership obligation, and the Union's exercise of its disciplinary authority is none of the Board's affair. As a member, therefore, the employee may be expelled, suspended, fined, reprimanded, or disciplined in other ways, and objection to the means or extent of discipline is the concern of tribunals other than the Board.

It is this duality which this Court synthesized and preserved in *Allis-Chalmers* and *Scofield*. As the Court observed in *Scofield*, "As an employee, he may be a 'good, bad, or indifferent' member so long as he meets the financial obligations of the union security agreement . . . . But as a union member . . . he is subject to union discipline." 394 U.S. at 429, n. 5. The court below unglues this synthesis by requiring the Board to determine the reasonableness of a union fine and thus draws it into the internal administration of union discipline.

4. In injecting the Board into a field foreign to its statutory concern the decision below has already worked a major dislocation in the law pertinent to review of union discipline.

The court below directs the Board to determine the reasonableness of the fines despite the absence of any effort by the members to exhaust their available internal union remedies. Many did not appear for trial at all; others who appeared for trial and were fined took no internal appeal from the adverse decision (*supra*, pp. 5-6). Accordingly, those who did not appear for trial disregarded the internal union procedure altogether. Those who did appear for trial but did not appeal forewent the internal appellate opportunity for reversal or favorable modification. In sum, therefore, the internal union procedure was disregarded at its trial stage by many and at its appellate stage by all.

To require the Board to review the reasonableness of the fine when the internal union procedure for consideration of the issue has been bypassed conflicts with

the requirement that the available internal remedy be exhausted before relief is sought from other tribunals. Where an available union remedy is shunted, no extraunion tribunal should ordinarily consider in the first instance a question whose determination would distinctly benefit from full prior union scrutiny, which may be self-corrected if the claim is urged internally, and where forbearance would further the independent interest in union self-government. As Justice Harlan cautioned, "courts and agencies will frustrate an important purpose of the 1959 legislation if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function." *N.L.R.B.* v. *Marine and Shipbuilding Workers,* 391 U.S. 418, 429 (1968) (concurrence).

But the court below flatly rejects the exhaustion requirement, holding that the "imposition of such a requirement in this case concerning the reasonableness issue would not . . . best serve the interests of justice or further the objectives of the N.L.R.A. The issue here involves public policy and thus transcends the pure internal affairs of the Union" (*infra,* p. 23a, n. 27).

The requirement of exhaustion cannot be finessed by saying that the substantive issue "involves public policy." The doctrine of exhaustion has its source in a rule of judicial administration long and firmly established not only for internal union remedies but also in statutory administrative proceedings and for contractual adjustment procedures created by collective

bargaining agreements. It is part of "public policy" to require prior recourse to the tribunals having initial responsibility for decision before permitting intercession by other ultimate reviewing bodies. The interest in orderly procedure which the exhaustion requirement serves is as exigent whether the substantive issue to be adjudicated is said to be "public," "private," or an admixture. There is nothing in the nature of a "reasonableness" issue which suggests that it is not suited to prior union scrutiny through the union trial and appellate procedures. On the contrary, the issue especially implicates close attention to particularities, which resist useful generalization, and would therefore uniquely benefit from full initial union examination.

The court below invokes this Court's decision in *N.L.R.B.* v. *Marine and Shipbuilding Workers*, 391 U.S. 418 (1968), to support its view (*infra*, p. 23a, n. 27). But *Marine Workers* holds that exhaustion is not required where the rule for whose violation discipline is imposed is itself invalid. A rule against strikebreaking is of course valid, and the reasonableness of a fine for its breach is a question within the heartland of union self-government. Prior recourse to its procedures is hence obligatory if those procedures are adequate and fair. The court below thus again misreads this Court's decisions and in the process works a gross distortion of accepted law.

5. Section 8(b)(1)(A) and its proviso were enacted in 1947. The Board's consistent interpretation of the proviso, from the beginning to the present, is that it places the administration of union discipline to enforce a valid union rule outside its regulatory author-

ity.[5] It is of course settled that an agency's uniform construction of its own statute, especially a contemporaneous construction, "is entitled to great deference." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). And in this case that "prior long-standing and consistent administrative practice must be deemed to have received congressional approval." *Fribourg Navigation Co.* v. *C.I.R.*, 383 U.S. 272, 283, (1966). For the Board's "interpretation of § 8(b)(1)(A) . . . was reinforced by the Landrum-Griffin Act of 1959 which, although it dealt with the internal affairs of unions, including the procedures for imposing fines or expulsion, did not purport to overturn or modify the Board's interpretation of § 8(b)(1)." *Scofield*, 394 U.S. at 429. An administrative construction with these credentials should stand. Yet the court below heedlessly upsets it.

In sum, the court below has decided an important and recurrent question in the administration of the Act in a way which conflicts with this Court's decisions, upsets the allocation to the courts of the function of overseeing union administration of internal discipline, injects the Board into a field foreign to its statutory concern, destroys the exhaustion require-

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[5] *International Typographical Union*, 86 NLRB 951, 957 (1949), affirmed, 193 F.2d 782, 800-801 (C.A. 7, 1951); *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954); *Foundation Co.*, 120 NLRB 1453, 1466 (1958); *Allen-Bradley Co.*, 127 NLRB 44, 47 (1960), enforcement denied, 286 F.2d 442, 446 (C.A. 7, 1961), but court's opinion not acquiesced in by Board, *Scofield*, 145 NLRB NLRB 1097, 1102 (1964), and Board's decision affirmed, 394 U.S. 423 (1969); *Local 248, United Automobile Workers*, 149 NLRB 67 (1964), affirmed, 388 U.S. 175 (1967); *Independent Stave Co.*, 175 NLRB 156, 159 (1969).

ment in an area where its operation is especially fit, and discards a long-settled and consistent administrative construction. Review by this Court is essential.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted, and the case should be set down for argument together with *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO,* October Term, 1971, No. 71-711.

Respectfully submitted,

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April 1972

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24687

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

THE BOEING COMPANY, *Intervenor.*

No. 24744

THE BOEING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Intervenor.*

Judgment

Filed March 14, 1972

Before: MacKinnon and Wilkey, Circuit Judges and Gourley,* Senior District Judge for the Western District of Pennsylvania.

The above consolidated causes came on to be heard upon petitions to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated August 27, 1970, against Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors, and as-

* Sitting by designation pursuant to 28 U.S.C. § 294 (d) (1970).

signs. On February 3, 1972, the Court, being fully advised in the premises handed down its opinion granting enforcement of the Board's order in part and remanding the case in part to the Board for further consideration in accordance with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors and, assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees, who had resigned from and who were no longer members of Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, in the exercise of their rights guaranteed in Section 7 of the Act, by imposing fines against such employees because of their post-resignation conduct in working at the Michoud plant during the September 1965, strike, or by threatening to seek or seeking court enforcement of such fines.

(b) In any like or related manner, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Reimburse or refund to any employees, described in paragraph 1(a) of this Judgment, who have paid fines under the circumstances described in that paragraph, the amount of said fines imposed because of post-resignation conduct in working at the plant.

(b) Post at its office and meeting hall and at the Michoud, Louisiana plant of the Boeing Company, if the Company is willing, copies of the attached notice, marked "Appendix." Copies of said notice, on forms provided by the Regional

ctor for Region 15, (New Orleans, Louisiana), after g signed by an authorized representative, shall be ed at the aforementioned locations, in conspicious es, including all places where notices to employees are omarily posted, and reasonable steps shall be taken nsure that said notices are not altered, defaced, or red by other material.

) Notify said Regional Director, in writing, within ays from the date of this Judgment, what steps Union tioner has taken to comply herewith.

Is Further Ordered and Adjudged by the Court that ase be and it is hereby remanded in part to the Board further consideration in accordance with the Court's ion.

George E. MacKinnon
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Malcolm R. Wilkey.
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Wallace S. Gourley
Senior District Judge, for the Western District of Pennsylvania

APPENDIX

NOTICE TO MEMBERS

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT restrain or coerce employees who had resigned from the Union and who, in the exercise of their rights guaranteed in Section 7 of the Act, worked at the Michoud plant during the September 1965 strike, by imposing fines or by threatening to seek or by seeking court enforcement of said fines as to such employees.

WE WILL reimburse nonmembers abovementioned for any fines they may have paid to us for working during the said strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed to them in Section 7 of the National Labor Relations Act.

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, T6024 Federal Building (Loyola) 701 Loyola Ave., New Orleans, La. 70113 Telephone 504-527-6361.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,687

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
THE BOEING COMPANY, INTERVENOR

No. 24,744

THE BOEING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERVENOR

Petitioners for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

Decided February 3, 1972

Mr. Bernard Dunau, with whom *Messrs. Plato E. Papps* and *C. Paul Barker* were on the brief, for petitioner in No. 24,687 and intervenor in No. 24,744.

Mr. C. Dale Stout for petitioner in No. 24,744 and intervenor in No. 24,687.

Mr. Glen M. Bendixsen, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman*, General Counsel at the time the brief was filed, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Stanley R. Zirkin*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before MacKinnon and Wilkey, *Circuit Judges*, and Gourley,* *Senior District Judge* for the Western District of Pennsylvania.

MacKinnon, *Circuit Judge:* In this case, we are called upon to examine the right of a labor organization, consonant with the provisions of the National Labor Relations Act (N.L.R.A.), to discipline those members who have crossed its picket line to work during an authorized strike. We must determine the effect which a member's resignation from the union, before, during, or after such conduct, has upon the union's disciplinary authority. We are also requested to consider the legal implications of the "reasonableness" of the fines imposed, where the union has threatened enforcement thereof, or has actually sought collection through legal means.

The essential facts are not in dispute. Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter sometimes referred to as the Union), and The Boeing Company, (hereinafter sometimes referred to as the Company), were parties to a collective bargaining agreement which was effective from May 16, 1963, through September 15, 1965.[1] Upon the expiration of the contract, the Union commenced a lawful strike against Boeing at its Michoud plant, as well as at various other locations. This work stoppage lasted 18

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] At the time of the execution of the 1963-1965 agreement, Booster Lodge No. 405 was not yet in existence. Boeing's Michoud, Louisiana plant, with which we are concerned in this case, was considered to be a "remote location" unit, identified with the "primary location" unit at Seattle-Renton, Washington. Therefore, the production and maintenance employees in the Michoud unit were represented by Aeronautical Industrial Lodge No. 751, I.A.M., AFL-CIO, of Seattle, a signatory to the above-mentioned contract with Boeing. Booster Lodge No. 405 came into existence sometime later in 1963, with jurisdiction over the Michoud plant, but the bargaining agreement was not modified to reflect this occurrence.

days. On October 2, 1965, a new bargaining agreement was signed, and the economic strikers returned to work the following day. Both the expired agreement and the newly executed contract contained maintenance-of-membership clauses, which required all new employees to notify both the Union and the Company within 40 days of their acceptance of employment if they elected not to become Union members. It also required those who were Union members to retain their membership during the contract term.

During the strike period, approximately 143 employees, of tht 1900 production and maintenance employees represented by the Union at the Michoud plant, crossed the picket line and reported to work. All of these persons had been Union members during the 1963-1965 contract period. Some of the employees who worked during the strike made no attempt to resign from the Union during the strike. The remaining 119 submitted their voluntary resignations, in writing, to both the Union[2] and the Company. About 61 of the employees who resigned did so *before* they crossed the picket line and returned to work. Another 58 resigned during the course of the strike, but *after* they had crossed the picket line in order to work. All resignations were submitted after the expiration of the 1963-1965 contract, and before the execution of the new agreement, and all were submitted prior to the imposition of any Union discipline. Union members had not been warned prior to the strike that disciplinary measures could, or would, be taken against those who crossed the picket line to work, nor had any such

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[2] The Union objected below to the fact that notices of resignation were sent to District Lodge 751, rather than to Booster Lodge 405. However, since Booster Lodge 405 was not a party to the original 1963-1965 agreement, as explained in footnote 1, *supra*, it is clear that the employees who notified District Lodge 751 were attempting to comply with the applicable contractual requirements. Furthermore, District Lodge 751 notified Booster Lodge 405 of all resignations it received. We thus see no validity in the objection.

discipline been imposed on members by Booster Lodge 405 prior to this time.

In late October or early November of 1965, the Union notified all members and former members who had crossed the picket line to work during the strike that charges had been preferred against them under the International Union Constitution, for "Improper Conduct of a Member" due to their having "accept[ed] employment . . . in an establishment where a strike exist[ed]." They were advised of the dates of their Union trials, which were to be held even in their absence if they did not appear, and they were notified of their right to be represented by any counsel who was a member of the International Association of Machinists and Aerospace Workers. Pursuant to the International Union Constitution provision which permitted the imposition of disciplinary measures, including "reprimand, fine, suspension, or expulsion from membership, or any lesser penalty or combination," where a member had been found guilty of misconduct after notice and a hearing, fines were imposed on all employees who had worked during the strike. No distinction was drawn between those persons who had resigned from the Union during the course of the strike and those who had remained Union members.

Employees who did not appear for trial before the Union Trial Committee and those who appeared but were found guilty were fined $450.00 each, the amount determined by the membership, and they were barred from holding a Union office for a period of 5 years. The fines of about 35 employees who appeared for trial, apologized, and pledged loyalty to the Union, were reduced to 50 percent of the earnings they received during the strike.[3] In some of

[3] Employees who worked during the strike earned between $2.38 and $3.63 per hour, or between $95 and $145 per 40-hour week. In some instances, earnings during the strike period were supplemented by the inclusion of bonus or premium rates for weekend and overtime work.

these cases the time period during which these persons were prohibited from holding Union office was decreased to a period based upon the number of days of strikebreaking activity each respective person had engaged in. None of the disciplined individuals processed intra-Union appeals.

Although none of the $450.00 fines has been paid, reduced fines have been paid in some instances. The Union has sent out written notices that the matter has been referred to an attorney for collection, that suit will be filed if the fines remain unpaid, and that reduced fines will be reinstated to $450.00 in the event of nonpayment. The Union has also filed suit against nine individual employees to collect the fines (plus attorney's fees and interest). None of these suits has yet been resolved.

On February 18, 1966, the Company filed a charge with the N.L.R.B., alleging that the Union had violated Section 8(b)(1)(A) of the N.L.R.A.[4], and a complaint was issued by

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[4] 29 U.S.C. § 158(b)(1)(A) (1970), which provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

29 U.S.C. § 157 (1970) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

the General Counsel. The Labor Board decided that the Union violated section 8(b)(1)(A): (1) by fining those employees who had resigned from the Union before they returned to work during the strike; and (2) by disciplining those employees who had resigned after returning to work, to the extent that the fines were imposed for their working during the strike after their resignations. The Board further found that the Union did *not* violate the Act (3) by fining members for crossing the picket line to work, and by fining those employees who had resigned after returning to work during the strike, for work they performed during the strike prior to their resignations.

Finally, the Board determined (4) that it was not the intention of Congress to have the N.L.R.B. regulate the size of such disciplinary fines and establish standards with respect to their reasonableness, and it dismissed the claim that otherwise legal fines may be rendered violative of the N.L.R.A. if unreasonably large. A cease and desist order was issued, and the Union was ordered to refund any fines collected from employees who had resigned before returning to work. The Union was also required to refund a pro rata portion of those fines collected from employees who had resigned after first engaging in work during the strike, so that the part of the fines retained would only reflect pre-resignation conduct.

Booster Lodge 405 challenges the Board's conclusion that a mid-strike resignation from a union relieves an individual from the burden of union discipline with respect to his post-resignation activity, while The Boeing Company contends that the N.L.R.B. should have examined the reasonableness of the fines imposed by the Union. The Board seeks enforcement of its order.

Part I of this opinon discusses the legality of the imposition of the disciplinary fines by the Union in response to the strikebreaking by the approximately 143 employees in-

volved. Part II considers the effect the reasonableness of the fines has upon their propriety under the N.L.R.A., and the proper function of the N.L.R.B. in this area. Finally, Part III deals with the propriety of the Board's remedial order.

I

The Legality of the Disciplinary Fines

A. *The Employees Who Did Not Resign*

As early as 1954, in *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954), the Labor Board held that a union did not violate Section 8(b)(1)(A) of the Act by imposing a fine on a member for his failure to perform picket duty during the course of an authorized strike. The Board declared that the *proviso* to 8(b)(1)(A)[5] precluded any interference by it with the internal affairs of a labor organization in such a situation. In *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), a divided Supreme Court similarly determined that a union did not violate the N.L.R.A. when it imposed, and attempted to enforce through court action, reasonable fines against members for their failure to honor an authorized picket line. Instead of relying upon the express language of the *proviso*, however, the Supreme Court carefully analyzed the entire legislative history of Section 8(b)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against "restraint" or "coercion." See 388 U.S. at 183-195.[6] The Court noted:

> National labor policy has been built on the premise that by pooling their economic strength and acting

[5] *See* n. 4, *supra*.

[6] For another good analysis of the legislative history of § 8(b)(1)(A), *see National Maritime Union*, 78 NLRB 971, 982-987 (1948), *enfd.*, 175 F.2d 686 (2nd Cir. 1949), *cert. denied*, 338 U.S. 954 (1950).

through a labor organization freely choosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ."

388 U.S. at 180. See *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332 (1944). The Court further stated:

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion [of] its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . ."

388 U.S. at 181.

In more recent decisions, the Supreme Court has reaffirmed the right of a union to impose and enforce reasonable fines against members who engage in strikebreaking activities. In *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 428-430 (1969), the Court emphasized the right of a union to enforce a properly adopted rule which reflects a legitimate union interest, impairs no statutory labor policy, and is reasonably enforced against union members. *See N.L.R.B.* v. *Marine Workers*, 391 U.S. 418, 423 (1968). *See also*

Rocket Freight Lines Co. v. *N.L.R.B.*, 427 F.2d 202, 205-206 (10th Cir.), *cert. denied*, 400 U.S. 942 (1970); Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187 (1969). In light of these developments,[7] it is clear that the Union acted within the sphere of its lawful authority when it decided to impose fines on the 24 strikebreaking members who did not resign from the Union.[8] Similarly, the Union's threats to enforce these fines, as well as its actual efforts to achieve court enforcement thereof, were not prohibited by the N.L.R.A.. However, a more difficult question arises with respect to the 119 employees who resigned from the Union during the strike period.

B. *The Employees Who Did Resign*

As the Supreme Court recognized in *Allis-Chalmers*, when Section 8(b)(1)(A) was enacted, "Congress was operating within the context of the 'contract theory' of the union-member relationship which widely prevailed at that time." *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 192. *See International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 618 (1958). Under this theory union membership was deemed in effect to create a "con-

[7] The Company has asked this court to overrule *Allis-Chalmers* in order to force reconsideration of the union discipline area by the Supreme Court, but that is not our function. We recognize that "the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2nd Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). In light of *Scofield* and *Marine Workers*, any argument for such reconsideration must be addressed to the Supreme Court itself. *See U. S. Gypsum Co.* v. *Steelworkers*, 384 F.2d 38, 42-44 (5th Cir. 1967), *cert denied*, 389 U.S. 1042 (1968); *United States* v. *Ullman*, 221 F.2d 760, 762 (2nd Cir. 1955), *affd.*, 350 U.S. 422 (1956).

[8] *See* Part II, *infra*, regarding the effect of the "reasonableness" of the fines imposed on their legality under § 8(b)(1)(A).

tract" between the labor organization and the member which imposed certain obligations on the member, and the decision emphasized "that 'The courts' role is but to enforce the contract.'" 388 U.S. at 182. *See* Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L. J. 175, 180 (1960). It is, therefore, obvious that *membership* in the labor organization is the *sine qua non* to the authority of a union to impose desciplinary burdens upon the employees it represents. This has been widely recognized.

In *Allis-Chalmers*, the Court expressly limited its holding to "reasonable discipline of *members* who violate rules and regulations governing *membership*." *N.L.R.B.* v. *Allis-Chalmers Mfg. Co. supra*, 388 U.S. at 181 (emphasis supplied). *See also id.* at 195-196.[9] The Labor Board specifically recognized this indispensable prerequisite in *Scofield*, 145 NLRB 1097, 1104 (1964), where it noted that "[a] union rule that a *member* is subject to a fine if he [violates a valid union rule] does not mean that he is subject to such a fine as an *employee*." (emphasis in original) This membership requirement for union disciplinary authority was affirmed by the Supreme Court in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 429 n. 5:

> As an employee, [an individual] may be a "good, bad, or indifferent" member so long as he meets the finan-

[9] In *Allis-Chalmers*, all of the persons disciplined by the union enjoyed full membership status. Thus the Court was not required to decide what obligations vis-a-vis the union a person would be under where he was not a full member, but only a "limited member" who merely paid dues and fees in accordance with an appropriate union-security agreement. 388 U.S. at 197. *See* 29 U.S.C. § 158(a)(3) (1970); *N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). Since the contracts involved in the instant case only contained maintenance-of-membership provisions, employees were either full members or total non-members. For this reason, we too intimate no view regarding the obligation which a union may lawfully impose on a person whose only ties with the labor organization are his payment of dues and fees.

cial obligations of the union security contract. * * * But *as a union member, so long as he chooses to remain one, he is subject to union discipline.* (emphasis supplied)

See 394 U.S. at 435. Thus the Court recognized that "union members . . . are free to leave the union and escape the [union] rule." *Id.* at 430.[10] It is therefore apparent that *Booster Lodge 405 only had the authority to discipline those employees who were in fact Union members at the time they engaged in the complained of activity.*

Approximately 58 of the employees who worked during the strike submitted their resignations to the Union *after* they had already engaged in some of the conduct proscribed by the International Union Constitution. In light of the above discussion regarding union authority over action undertaken by full members, we must concur in the Board's determination that the Union did not violate Section 8(b)(1)(A) *so far as its imposition of disciplinary fines concerned this pre-resignation conduct.* The fact that the fines were not officially imposed for these pre-resignation breaches of Union regulations until after the strikebreakers had resigned, in no way negated the authority of the Union

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[10] "[N]o employee is subject to union rules if he chooses to forego the privileges and duties of union membership." Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Rev. 187, 190 (1969). *See International Association of Machinists and Aerospace Workers, Local Lodge 504*, 185 NLRB No. 22, 75 LRRM 1008 (1970). Since unions are only authorized to impose discipline where legitimate *internal affairs* are concerned, *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra; Scofield* v. *N.L.R.B., supra; N.L.R.B.* v. *Marine Workers*, 391 U.S. 418, 424 (1968); *Local 138, International Union of Operating Engineers*, 148 NLRB 679, 682 (1964), it is clear that any effort to fine non-members would constitute an attempt to affect *external activities*, an area in which Congress did not intend to permit such union regulation. This was correctly recognized by the N.L.R.B. in this case.

over these persons with respect to these acts, as the N.L.R.B. properly recognized.

> The provisions of a contract are enforceable, and a cause of action can be brought upon them, even after the expiration or termination of the agreement. The rights and duties created by an agreement thereof. Thus the termination of some employees' membership here did not affect the Union's subsequent assertion of rights which had accrued to the Union during their earlier period of membership, such as the right to discipline the employees for prior strikebreaking. The effect of these employees' resignations was only to extinguish the Union's future authority over them.

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, 185 NLRB No. 23, 1970 CCH NLRB ¶ 22,259, at p. 28,693 (1970).[11]

C. *Fines Imposed for Post-resignation Conduct*

An extremely difficult question is presented with respect to the fines which were imposed upon employees for their *post*-resignation conduct.[12] Booster Lodge 405 has made a sophisticated argument which would expose persons who were members at the commencement of a particular strike to union discipline with respect to any strikebreaking action undertaken during that specific work stoppage. Although it concedes that such a restriction is not contained in any of

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[11] A resignation acts to terminate the existing relationship so far as the incursion of future obligations is concerned. Previously established or perfected liabilities survive the termination. *See* 5A CORBIN, CONTRACTS § 1229, pp. 508-510 (1964).

[12] This would, of course, include the approximately 61 persons who resigned from the Union *before* engaging in any strikebreaking activity, as well as the 58 persons discussed previously, who resigned during the period of their strikebreaking, so far as their actions undertaken *after* they effectively resigned are concerned.

the express language of the International Union Constitution or By-laws, the Union urges this court to "flesh out" such documents by imposing such an obligation by implication. We must decline this invitation.

It must be emphasized that in situations like this, while "the function of the court is to determine, as far as is possible, the intention of the contracting parties and to give legal effect thereto," [13] it is generally recognized that courts will not usually imply offenses not specified in a union's constitution or by-laws.[14] We believe that this latter consideration is controlling with respect to the instant case. As the Union recognizes, there is nothing in the record which evidences any intention on the part of the approximately 119 persons who resigned during the strike in question that their initial acceptance of Union membership would impose upon them the type of continuing obligation which Booster Lodge 405 now asks this court to impose. Furthermore, the very fact that they resigned during this period, in an obvious attempt to escape the disciplinary authority of the Union, belies this proposed line of reasoning.

In addition, an extremely important national labor policy militates against the imposition of such an implied obligation. Section 7 of the N.L.R.B.[15] expressly protects the right of any employee to refrain from any or all of the concerted activities guaranteed to employees under the Act. While *Allis-Chalmers* and *Scofield* recognized the legality of certain *express* union provisions limiting an employee's freedom where he had voluntarily accepted full union membership, nothing in those decisions supports the Union's theory of implied, post-resignation restrictions. In fact, language

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[13] 1 CORBIN, CONTRACTS § 95, p. 396 (1963).

[14] Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1059-1061 (1951), and *see* cases cited therein.

[15] 29 U.S.C. § 15 (1970). *See* n. 4, *supra*.

in *Scofield* expressly indicates otherwise. The Supreme Court only recognized the right of a union "to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union *members who are free to leave the union and escape the rule.*" *Scofield v. N.L.R.B., supra*, 394 U.S. at 430 (emphasis supplied). As the Board properly concluded below, after resignation, "[b]oth the member's duty of fidelity and the union's corresponding right to discipline him for breach of that duty are extinguished." *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, supra*, 1970 CCH NLRB ¶ 22,259, at p. 28,692.

The Union has relied heavily upon the First Circuit's holding in *N.L.R.B. v. Granite State Joint Board, Textile Workers Union, Local 1029*, 446 F.2d 369 (1st Cir. 1971), but we believe that the decision is inapposite to the present fact situation. Although the court in *Granite State* upheld the right of the union involved to impose fines on strikebreakers for post-resignation activity, it emphasized that a specific set of facts was present which it believed rendered such a result equitable, and it specifically recognized that these considerations were not present with respect to the instant Booster Lodge 405 case.[16] In *Granite State*, the Board conceded that all of the fined employees had voted in favor of the strike in question.[17] It is also important to note that the fines had not been imposed pursuant to a general provision in the union constitution, as here, but rather in accordance with a specific proclamation which had been unanimously adopted by the membership after the work stoppage commenced. *See* 446 F.2d at 370, 372 n. 5. Further-

[16] *See* 446 F.2d at 372 n. 5, wherein the First Circuit distinguished the facts present in the instant case from those present in *Granite State*.

[17] 446 F.2d at 370, n. 2. In the present case, there is no evidence that the disciplined strikebreakers voted to strike.

more, all of those who were disciplined in *Granite State* had been expressly pre-warned of possible punishment for strikebreaking,[18] while the employees with whom we are herein concerned received no such pre-strikebreaking notification. Because of these distinguishing facts, we refuse to apply the rationale of *Granite State* to the instant factual situation.[19] The strong equities which weighed in favor of the union there, are clearly not present here. In fact, their very absence powerfully supports the result which we have accepted.

Since the International Union Constitution and By-laws contained no express restriction upon a member's right to resign, it is clear that the strikebreaker/employees were free to resign at will, subject only to their being bound by any permissible collective bargaining agreement provision limiting this right. *Local Union 621, United Rubber, Cork, Linoleum and Plastic Workers of America*, 167 NLRB 610 (1967); *Communications Workers v. N.L.R.B.*, 215 F.2d 835 (2d Cir. 1954); *N.L.R.B. v. Mechanical and Allied Production Workers, Local 444*, 427 F.2d 883 (1st Cir. 1970). Furthermore, since the resignations all occurred after the termination of the 1963-1965 agreement and before the execution of the new contract, the maintenance-of-membership provision was not applicable to limit this right either. *N.L.R.B. v. Mechanical and Allied Production Workers, Local 444, supra*, 427 F.2d at 884-885; *N.L.R.B. v. Granite State Joint Board, Textile Workers Union, Local 1029, supra*, 446 F.2d at 372. Under these circumstances we concur in the reasoning of the Second Circuit in *Communications Workers* v. *N.L.R.B., supra*, 215 F.2d at 838:

> We agree that the proviso [to § 8(b)(1)(A)] protects the Union's right to make its own rules with re-

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[18] 446 F.2d at 371.

[19] To the extent that the First Circuit's decision in *Granite State* may be read to support Booster Lodge 405's position here, we respectfully decline to follow it.

spect to membership, but assuming, *arguendo*, that a rule wholly prohibiting voluntary resignations would be valid, we think that in the absence of any rule on the subject of voluntary resignation, the *proviso* is inapplicable. Concededly the Union Constitution and by-laws are absolutely silent as to whether a member can voluntarily resign. Hence we think that the common law doctrine on withdrawal from voluntary associations is apposite. Under that doctrine, a member of a voluntary association is free to resign at will, subject of course to any financial obligations due and owing the association. [citations omitted] [20]

For the reasons set out above, we conclude that the Labor Board correctly determined that "the Union's right to discipline employees terminated upon the employees' submission of their letters of resignation [, thus t]he attempted imposition of discipline for subsequent conduct was beyond the powers of the Union." *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, supra*, 1970 CCH NLRB ¶ 22,259, at p. 28,692.[21]

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[20] We express no opinion herein concerning the legality of any union constitution or by-law provision expressly limiting the right of a member to resign during the period of an ongoing strike. *Compare N.L.R.B.* v. *International Union, U.A.W.*, 320 F.2d 12 (1st Cir. 1963). We similarly intimate no view regarding the legality of any such provision expressly imposing a continuing obligation on any resigning member to refrain from strikebreaking during a work stoppage which was properly commenced prior to the time of the resignation.

[21] It is clear, as the Board has recognized, that the "resignations were effective *upon receipt of notification by the Union.*" *Local 1012, U.E.*, 187 NLRB No. 46, 76 LRRM 1038 (1970) (emphasis supplied). *See Belle-Moc, Inc.*, 81 NLRB 6, 7 (1949); *Koenig Bros.*, 108 NLRB 304 (1954); *N.L.R.B.* v. *Vapor Recovery Systems Co.*, 311 F.2d 782, 785 (9th Cir. 1962). Any questions which may possibly arise concerning the effective dates of particular employee resignations can either be determined by the Board on remand of the reasonableness issue, in accordance with Part II of this opinion, or, if the N.L.R.B. prefers, such

We therefore affirm the Board's finding that the Union violated Section 8(b)(1)(A) of the N.L.R.A. by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage.[22] Since the imposition of fines under such circumstances violated the policies underlying the N.L.R.A. and had effects outside the area of internal Union affairs, they were clearly "coercive" within the meaning of Section 8(b)(1)(A). *See N.L.R.B. v. Marine Workers*, 391 U.S. 418 (1968); *District 50, Local 12419*, 176 NLRB No. 89, 71 LRRM 1311 (1969); *Local 138, International Union of Operating Engineers, AFL-CIO*, 148 NLRB 679 (1964). *See also International Molders and Allied Workers, Local 125*, 178 NLRB 208, 72 LRRM 1049 (1969), enfd., 442 F.2d 92 (7th Cir. 1971).[23] We thus grant enforcement of the

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problems may be left for resolution at the compliance stage or in supplemental proceedings. *United Steelworkers of America, Local 5571* v. *N.L.R.B.*, 130 U.S. App. D.C. 369, 373, 401 F.2d 434, 438 (1968), *cert. denied*, 395 U.S. 946 (1969). *See American Fire Apparatus Co.* v. *N.L.R.B.*, 380 F.2d 1005, 1007 (8th Cir. 1967); *N.L.R.B.* v. *International Longshoremen's Union, Local 12*, 378 F.2d 125, 130 (9th Cir 1967), *cert. denied*, 389 U.S. 846 (1967); *N.L.R.B.* v. *Darling & Co.*, 420 F.2d 63, 66 (7th Cir. 1970).

[22] This would include the Union's effort not only to discipline those employees who had resigned from membership before engaging in any strikebreaking, but also the organization's imposition of fines on those who resigned during the period of their strikebreaking, to the extent that such discipline was imposed as a result of their post-resignation conduct.

[23] The fact that the fines imposed upon the employees for conduct undertaken after they had severed their ties with the Union might not have been collectable in a subsequent collection suit, does not detract from the fact of their coerciveness at the time they were imposed. *See N.L.R.B.* v. *American Bakery and Confectionery Workers, Local 300*, 411 F.2d 1122, 1126 (7th Cir. 1969). *See also Local Union No. 167, Progressive Mine Workers of America* v. *N.L.R.B.*, 422 F.2d 538, 542 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).

N.L.R.B.'s cease and desist order so far as it concerns the imposition of fines for post-resignation conduct.[24]

II

The Board's Duty to Determine the Reasonableness of Fines

In its decision below, the N.L.R.B. relied upon a companion case, *International Association of Machinists and Aerospace Workers, Local 504* [Arrow Development Co.], 185 NLRB No. 22, 75 LRRM 1008 (1970),[25] in concluding that a fine's "reasonableness" has no effect upon its legality under the N.L.R.A. This conclusion was based upon the Board's belief that Congress did not intend to empower the Labor Board with the authority to examine the severity of union discipline when ascertaining its legality, and it indicated that it thought that local courts were the most logical tri-

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[24] This result also supports the Board's conclusion that the Union fines which were imposed upon the approximately 35 persons who apologized and pledged loyalty, should be confined to 50% of their *pre-resignation* strikebreaking earnings, since any attempt to enforce the discipline with respect to *post-resignation* remuneration could be reasonably construed as an effort to punish the very conduct which we have held the Union may not so regulate. "While it is true that [the Board's] retroactive order might [afford] these employees a better position . . . the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act." *Leeds & Northrup Co.* v. *N.L.R.B.*, 391 F.2d 874, 880 (3rd Cir. 1968). We therefore grant enforcement to that part of the Board's order which limits enforcement of such fines to 50% of pre-resignation earnings, which we believe results in the enforcement of a reasonable fine. Similarly, the prohibition against holding Union office, which, with respect to these persons, was calculated on a pro rata basis reflecting the number of strikebreaking days each worked, must necessarily also be restricted so that the length of such prohibitions will only reflect preresignation activity. *See* expanded discussion of the Board's remedial authority in Part III of this opinion, *infra*.

[25] Appeal is now pending before the Ninth Circuit, *sub nom. David O'Reilly* v. *N.L.R.B.*, No. 26,892.

bunals for the establishment of standards of reasonableness. The Board therefore refused to examine the question of reasonableness in the present case, despite an express determination by the Trial Examiner that the imposed fines were impermissibly excessive. We reject the position of the Board,[26] and remand the case for further proceedings in conformity with the views set out below.[27]

The Board's belief that it does not have the obligation of examining the reasonableness of union fines in Section 8(b)(1)(A) proceedings is based upon a clear misconception of the law and the Supreme Court's relevant decisions. In *Allis-Chalmers*, the Court stated:

> It is no answer that the proviso to §8(b)(1)(A) preserves to the union the power to expel the offending

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[26] We emphasize the fact that in the instant case, the Union not only threatened to utilize court action to enforce the fines imposed, but in several instances, actual collection suits were begun. Under such circumstances, we believe that the reasonableness of the fines in question is highly relevant to the question of their legality under § 8(b)(1)(A). We intimate no view regarding the need for an examination of the reasonableness of disciplinary fines where the only enforcement mechanism contemplated by the union involves the expulsion of the individual from the union.

[27] Although the Union has argued that the aggrieved employees should not have the right to have a Board determination concerning the reasonableness of the fines imposed, due to the fact that they have not exhausted all available internal Union remedies, we reject this contention. An individual need not, in all cases, exhaust all internal union procedures before seeking the services of the N.L.R.B. *See N.L.R.B.* v. *Marine Workers*, 391 U.S. 418 (1968); *Local 138, International Union of Operating Engineers*, 148 NLRB 679 (1964). The imposition of such a requirement in this case concerning the reasonableness issue would not, in our opinion, best serve the interests of justice or further the objectives of the N.L.R.A. The issue here involves public policy and thus transcends the pure internal affairs of the Union. 391 U.S. at 422-428.

member. Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a *reasonable fine.*

N.L.R.B. v. Allis-Chalmers Mfg. Co., supra, 388 U.S. at 183 (emphasis supplied). The Court further recognized that "the proviso preserves the rights of unions to impose fines, *as a lesser penalty than expulsion . . .*" 388 U.S. at 191-192 (emphasis supplied).[28] This implicity recognized that, for a disciplinary fine to be less coercive than expulsion from the union, the fine imposed must be a "reasonable" one, for it is intuitively obvious that enforcement of a grossly excessive fine might visit a far greater burden upon an individual than would mere expulsion.[29] The Supreme Court also ex-

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[28] Justice White, in his concurring opinion, observed:

> [S]ince expulsion would in many cases—certainly in this one involving a strong union—be a far more coercive technique for enforcing a union rule and for collecting a *reasonable fine* than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of § 7 rights, nevertheless intended to bar enforcement by another method [court action] which may be far less coercive.

388 U.S. at 198 (emphasis supplied). It is also informative to note the express interpretation given to the *Allis-Chalmers* opinion by the dissenting members of the Court: "[T]he Court's holding boils down to this: a court-enforced *reasonable fine* for nonparticipation in a strike does not 'restrain or coerce' an employee in the exercise of his right not to participate in the strike." 388 U.S. at 200-201 (dissenting opinion of Black, J.) (emphasis supplied).

[29] Even the attorney who argued *Allis-Chalmers* for the union before the Supreme Court has recognized this limitation in the Court's decision. He has indicated that *Allis-Chalmers* only determined that "a union suit to collect a *reasonable fine* imposed on a member for violating a 'no strikebreaking' rule does not violate section 8(b)(1)." Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield,* 38 GEO. WASH. L. REV. 187, 190 (1969) (emphasis supplied).

pressly recognized this fact in its recent *Scofield* decision, wherein it concluded that the enforcement of a proper union rule "by *reasonable fines* does not constitute the restraint or coercion proscribed by §8(b)(1)(A)." *Scofield* v. *N.L.R.B.*, *supra*, 394 U.S. at 436 (emphasis supplied). The *Scofield* Court emphasized that under *Allis-Chalmers*, "[a] union rule, duly adopted and not the arbitrary fiat of a union officer, forbidding the crossing of a picket line during a strike [is] . . . enforceable against voluntary union members by expulsion or a *reasonable fine*." 394 U.S. at 428 (emphasis supplied). In light of the Court's emphasis on the requirement of "reasonable fines" if a union is to avoid a violation of the Act in these circumstances, we must conclude that the imposition of an unreasonably large fine, at least where the union threatens or actually attempts court enforcement of the fine, may be coercive and restraining within the meaning of section 8(b)(1)(A).

Since the imposition of an unreasonably excessive disciplinary fine is violative of Section 8(b)(1)(A), it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised. The Board asserts that such a result might cause conflicts between it and state courts which attempt to examine the reasonableness issue in actions to collect such fines. However, we do not believe that this possible problem detracts from the Board's obligation under the N.L.R.A.[30]

We recognize that "state courts have been adjudicating internal union disputes for more than 60 years." Summers, *The Law of Union Discipline: What the Courts Do in Fact*,

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[30] The question of the extent to which union action for enforcement of disciplinary penalties is pre-empted by federal labor law is not before this court, and we intimate no view concerning the resolution of this complex issue. *Compare San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959), *with Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966). *See N.L.R.B.* v. *Allis Chalmers Mfg. Co.*, *supra*, 388 U.S. at 197 n. 37.

70 YALE L.J. 175 (1960).[31] We further acknowledge the fact that "the state courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe [monetary] hardship.' "[32] However, these considerations do not relieve the N.L.R.B. of its duties under the N.L.R.A. "[T]he business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not 'affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .' §10(a), . . . 29 U.S.C. §160(a)." *N.L.R.B. v. Strong*, 393 U.S. 357, 360 (1969). *See Office and Professional Employees International Union, Local 425* v. *N.L.R.B.*, 136 U.S. App. D.C. 12, 15-16, 419 F.2d 314, 317-318 (1969).[33] Furthermore, the fact that

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[31] *See* cases cited 70 YALE L. J. at 175 n. 3. "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield* v. *N.L.R.B., supra*, 394 U.S. at 426 n. 3.

[32] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 193 n. 32, quoting from Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1078 (1951). For some examples of state court willingness to examine the reasonableness of union disciplinary fines, *see: North Jersey Newspaper Guild, Local 173* v. *Rakos*, 110 N.J. Super 77, 74 LRRM 2487 (N.J. Sup. Ct., App. Div. 1970); *L.A. Newspaper Guild, Local 69* v. *Armenta*, 73 LRRM 2078 (Cal. Sup. Ct., App. Dept. 1969); *Walsh* v. *Communications Workers of America*, 75 LRRM 2629, 2632 (Md. Ct. of App. 1970); *McCauley* v. *Federation of Musicians, Local 294*, 26 LRRM 2304 (Pa. Ct. of Com. Pls. 1950).

[33] Although the Union has cited language in *U.O.P. Norplex, Div. of Universal Oil Products Co.* v. *N.L.R.B.*, 445 F.2d 155, 158 (7th Cir. 1971), stating that "[t]he reasonableness of . . . fines is a matter for the state court to determine should the Union seek judicial enforcement of the fines," in support of its contention that this issue is outside the scope of the Board's authority, this statement is clearly not apposite to the present case. The Court was there concerned with whether the subject of internal

some state courts might not permit enforcement of excessive fines in a collection action by the union, does not detract from their coerciveness, or the need for N.L.R.B. action. *N.L.R.B.* v. *American Bakery and Confectionery Workers, Local 300*, 411 F.2d 1122, 1126 (7th Cir. 1969). *See Local Union No. 167, Progressive Mine Workers of America v. N.L.R.B.*, 422 F.2d 538, 542 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).

Other factors also support the conclusion that Board intervention is authorized in this very limited area, despite the historical activity of state courts and the reluctance of the 80th Congress to interfere in the internal affairs of unions. There is something to be said for having the reasonableness of fines determined by standards that are as nearly uniform as national standards promulgated by the N.L.R.B. can be. Furthermore, access to the Labor Board is more readily available than meaningful access to state courts. Before the Board, the employee is represented by the General Counsel, and the agency bears the expense of the litigation. If the same employee wants a complete resolution of the reasonableness issue in a state court collection action brought by the union, he must be prepared to accept at least some financial burden. "The danger that the legal rights of a disciplined member will go by default because of the cost of asserting them in court is obvious . . ." Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 220 (1960). We therefore reject the argument that the N.L.R.B. is required to defer to state tribunals with respect to the reasonableness issue. Such "reverse preemp-

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union fines was a mandatory subject for collective bargaining, and it recognized that "even *if the fines were excessive, the remedy would be for the company to file an 8(b)(1)(A) charge against the union*, not to try to convert an otherwise non-mandatory subject of bargaining into a 'term or condition of employment'." 445 F.2d at 158 n. 7 (emphasis supplied). The Boeing Company followed the exact procedure suggested.

tion" would not, in our view, be consonant with the principles underlying the N.L.R.A.[34]

Although the Board has not previously had to examine the reasonableness of union fines, it is not without experience in a related area. Under Section 8(b)(5),[35] it is required to determine whether initiation fess required by a labor organization under a union-security agreement are excessive.[36] The fact that Section 8(b)(1)(A) does not provide the Board with specific standards to be applied in determining the reasonableness of a union fine, while Section 8(b)(5) does include several express standards, does not detract from the N.L.R.B.'s authority under 8(b)(1)(A). *See N.L.R.B. v. Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 582-583 (1961). "Experience and com-

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[34] We emphasize the fact that "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board . . ." *N.L.R.B.* v. *Truck Drivers Union*, 353 U.S. 87, 96 (1957). This is the very function which the Board is being asked to perform here.

[35] 29 U.S.C. §158(b)(5) (1970), which provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> (5) to require of employees covered by an agreement authorized under subsection (a)(3) [, i.e., a union-security provision,] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount *which the Board finds excessive* or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; (emphasis supplied)

[36] *See, e.g., Longshoremen, I.L.A., Local 1419*, 186 NLRB No. 94, 75 LRRM 1411 (1970), wherein a violation of §8(b)(5) was found. *See also N.L.R.B.* v. *Television & Radio Broadcasting Studio Employees, Local 804*, 315 F.2d 398 (3rd Cir. 1963).

mon sense will supply the grounds for the performance of this job," which we have concluded was implicitly entrusted by Congress to the Board. 364 U.S. at 583.

The Board must remember that a fine imposed for the violation of a legitimate union rule should be viewed as presumptively protective, and therefore privileged, when the amount of the fine, taking into account the character and importance of the ends served by the rule being enforced, is reasonably related to the need for protection. On the other hand, if the amount of the fine is such as to be inordinately disproportionate to the needed protection, an inference is warranted that the fine was imposed upon the member, not in vindication of a legitimate union interest, but rather as a reprisal for his having exercised a statutorily protected right. In the latter situation, as we have previously indicated, the fine would be "coercive" within the meaning of Section 8(b)(1)(A) of the Act. In determining whether an imposed fine is privileged or prohibited, due to its size, many factors may properly be considered by the Board. We shall mention several obvious factors which might be considered on remand, along with others the Board may consider to be applicable.

The reasonableness of a fine would necessarily have to be determined in light of the circumstances leading to its imposition. Such factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined, the detrimental effect of the strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, the availability of other less harsh union remedies, and many other similar considerations would clearly be relevant.

One additional consideration is worthy of mention. In its original *Scofield* decision, 145 NLRB 1097, 1104 (1964), the Board expressly indicated that a union had no right to

impose any penalty which would "impair the member's status as an employee." This prohibition against union disciplinary action adversely affecting an employee's employment status has been approved by the Supreme Court. *See N.L.R.B. v. Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 195; *Scofield v. N.L.R.B., supra*, 394 U.S. at 423, 428. While this principle clearly prohibits a union from seeking the suspension or termination of an employee by his employer due to his strikebreaking,[37] its implications may have further application which might be relevant to the present case. Where a disciplinary fine is unreasonably excessive, it may possibly affect the employee's employment status as adversely—and possibly even more adversely—as an illegally obtained employment suspension. On remand, the Board might also consider this protective policy of the Act in determining the reasonableness of the fines in question under Section 8(b)(1)(A).[38]

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[37] *See* 29 U.S.C. § 158(b)(2) (1970), which provides, *inter alia:*

> (b) It shall be unfair labor practice for a labor organization or its agents—
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> * * * * * * * *
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> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . .

29 U.S.C. § 158(a)(3) (1970), provides *inter alia:*

> (a) It shall be an unfair labor practice for an employer—
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> * * * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

[38] We, of course, recognize that Section 8(b)(2) was enacted to prevent a union from improperly interfering with an individual's employment relationship *through his employer*. However, this does not detract from the fact that this provision evidences a Congressional desire to protect an employee from any unreasonable adverse affect on his employment status by a labor organization. *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 195; *Scofield* v. *N.L.RB, supra*, 394 U.S. at 123, 128.

III

Labor Board Remedy

Although we are remanding this case to the N.L.R.B. for further consideration of the reasonableness question, it is apparent that the other aspects of the Board's decision below should be immediately affirmed. As was noted earlier in this opinion, the cease and desist order prohibiting further Union action pertaining to post-resignation strike-breaking conduct is granted enforcement. A more difficult question arises with respect to the affirmative aspects of the Board's decision.

"In § 10(c) of the Act [39] Congress has given the Board broad power to fashion remedies to effectuate the policies of the Labor Act. So long as the Board exercises responsibility in its judgment, courts should not interfere with its remedy, since this is 'peculiarly a matter for administrative competence.' Phelps Dodge Corp. v. NLRB, 313 U.S. 177, at 194 . . . (1941)." [40] "The Board's power to fashion remedies places a premium upon agency expertise and experience, and the broad discretion involved is for the agency and not the court to exercise." *Amalgamated Clothing Workers of America v. N.L.R.B.*, 125 U.S. App.D.C., 275, 281, 371, F.2d 740, 746 (1966).[41]

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[39] 29 U.S.C. § 160(c) (1970) authorizes the Board to require the perpetrator of an unfair labor practice "to take such affirmative action . . as will effectuate the policies of this [Act] . . ."

[40] *Office and Professional Employees International Union, Local 425* v. *N.L.R.B.*, 136 U.S. App.D.C. 12, 19-20, 419 F.2d 314, 321-322 (1969). *See Frank Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 704 (1944); *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 215-217 (1964). *See also N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

[41] *See* cases cited 125 U.S. App.D.C. at 281 n. 5, 371 F.2d at 746 n. 5.

With these considerations in mind, we clearly must affirm that part of the Board's order which requires the Union to reimburse the approximately 35 employees who apologized and pledged loyalty, thereby obtaining a reduction in their respective penalties, for any amounts paid which were based upon post-resignation strikebreaking earnings.[42] We similarly affirm that portion of the order requiring the total reimbursement of any fines paid by employees who effectively resigned before engaging in any strikebreaking activity.

With respect to the Board's order as it relates to the remaining employees who resigned, the Board established a reimbursement formula which pro rated each employee's respective fine, thereby limiting the collectable portion to that part which reflects the amount of pre-resignation conduct. It obviously believed that this was the most reasonable manner in which to rectify the effects of the Union's unfair labor practice with respect to these persons.

The utilization of remedial formulas has been approved by the Supreme Court. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). Keeping in mind our limited review function, we are unable to conclude that "the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943). "While it is true that [such] a retroactive order might afford the employees a better position . . . the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act." *Leeds & Northrup Co.* v. *N.L.R.B.*,

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[42] *See* n. 24, *supra*, for further discussion of the remedy pertaining to these persons.

391 F.2d 874, 880 (3rd Cir. 1968).[43] We therefore must affirm this portion of the Board's affirmative reimbursement order.

The case is remanded to the Labor Board for further consideration of the questions relating to the reasonableness of the fines imposed by the Union.

So Ordered.

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[43] We are cognizant of the fact that the Union's $450.00 fine was imposed upon all strikebreakers—except those who apologized and pleaded loyalty—regardless of the number of days of strikebreaking engaged in by each. Although the Union argues that this fact indicates that no pro rata reduction should have been required by the Board with respect to these employees, we recognize the N.L.R.B.'s obvious desire to formulate an affirmative order would rectify the Union's improper attempt to punish post-resignation conduct. We cannot conclude that the Board has abused its broad discretionary authority in this area. *See N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15-CB-779

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO and The Boeing Company

Decision and Order

On December 30, 1968, Trial Examiner Ramey Donovan issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel, the Charging Party, and the Respondent each filed exceptions to the Decision, together with supporting briefs. The Charging Party filed a reply brief. Subsequently in response to an invitation of the Board, the Charging Party and the Respondent filed supplemental briefs. In response to the same invitation, statements of position were filed by the National Association of Manufacturers, and by the American Federation of Labor and Congress of Industrial Organizations, joined by the International Brotherhood of Teamsters and the International Union, UAW, as *amici curiae*.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the reply brief, the supplemental briefs, the statements of position *amici curiae*, and the entire record in the case. The Board adopts the Trial Examiner's findings of fact, but adopts his conclusions and recommendations only to the extent that they are consistent with the decision herein.

The essential facts of this case are not in dispute. Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter called IAM or the Union, and Boeing were parties to a collective-bargaining agreement effective from May 16, 1963 through September 15, 1965.[1] Upon the expiration of the contract, the Union commenced a lawful strike against Boeing at its Michoud plant in New Orleans, Louisiana, and at various other locations. The strike lasted 18 days. On October 2, 1965, a new contract was signed. The strikers returned to work on the following day. Both contracts contained maintenance-of-membership clauses, which required new employees to notify both the Union and the Employer of their desire not to join the Union within 40 days of accepting employment.

During the strike period, some 143 employees of a unit of approximately 1900 production and maintenance workers crossed the picket line and reported for work. All had been members of the Union during the contract period. One group of strikebreaking employees, numbering some 24, made no attempt to resign from the Union. The remaining 119 strikebreaking employees submitted their voluntary resignations, in writing, to both the Union and the Employer.[2] Many

[1] At the time of the execution of the 1963 agreement, Booster Lodge 405 was not in existence. Boeing's Michoud, Louisiana, plant was considered a "Remote Location" unit, identified with the "Primary Location" unit at Seattle-Renton, Washington. Production and maintenance employees in the Michoud unit were represented by Aeronautical Industrial District Lodge No. 751, IAM, AFL-CIO, Seattle, a signatory to the contract with Boeing. Booster Lodge No. 405 came into existence sometime later in 1963, but the contract was not modified to reflect this event.

[2] The Union objects to the fact that notices of resignation were sent to District Lodge 751 rather than to Booster Lodge 405. However, since Booster Lodge 405 was not a party to the original contract, as explained in footnote 1 *supra*, it would appear that employees who notified District Lodge 751 were attempting to comply with contractual requirements. Moreover, District Lodge 751 notified Booster Lodge 405 of all resignations.

resigned from membership prior to reporting for work during the strike. Others resigned during the course of the strike, but returned to work before submitting their resignations.[3] All resignations were submitted after the expiration of the original contract and before the signing of the new one. All were submitted prior to the imposition of discipline by the Union.

In late October or early November 1965, the Union notified all strikebreaking employees that charges had been preferred against them under the International Constitution for "Improper Conduct of a Member" in "accepting employment . . . in an establishment where a strike . . . exists." Employees were advised of the dates of their trials, which were to be held even in their absence, and of the availability of union-member counsel. Prior to the strike, the Union had not warned members about the possible imposition of disciplinary measures. However, the IAM constitution provides that members found guilty of misconduct after notice and a hearing are subject to "reprimand, fine, suspension, or expulsion from membership, or any lesser penalty or combination." The constitution sets no maximum dollar limitation on fines.

Fines were imposed on all strikebreaking employees, regardless of whether, or when, they had resigned from the Union. Employees who did not appear for trial were fined $450, as were those who appeared and were found guilty. The fines of employees who appeared for trial, apologized, and pledged loyalty to the Union were reduced to 50 percent of strikebreaking earnings. The level of fines was set by the union membership. There is no indication of the

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[3] Four-hundred-and-fifty dollar fines were imposed on 108 employees. Of these, 61 had resigned their union membership prior to reporting for work during the strike, and others resigned during the course of the strike. Reduced fines were imposed on 35 employees. The record as to the timing of their resignations is not clear.

method of computation. Strikebreaking employees earned between $2.38 and $3.63 per hour, or between $95 and $145 per 40-hour week. In some instances, earnings during the strike were supplemented by the inclusion of bonus or premium rates for weekends and overtime.

Reduced fines have been paid in some instances. Payments have averaged $40. None of the $450 fines has been paid. The Union has sent out written notices that the matter has been referred to an attorney for collection, that suit will be filed upon nonpayment of fines, and that reduced fines will be increased for $450 in the event of nonpayment. The Union has filed suit against nine individual employees to collect the fines (plus attorney's fees and interest). The outcome of the suits has not been determined.

A principal issue in this case is the legality of the Respondent's imposition of disciplinary fines upon individuals who had resigned from the Union before engaging in the conduct for which the discipline was imposed. The complaint alleges, and the Trial Examiner found, that the Respondent's action in fining employees in this category violated Section 8(b)(1)(A) of the Act. We agree with the Trial Examiner's conclusion.[4] However, as the Trial Examiner has not fully spelled out his reasoning in this regard, and in light of the views of our dissenting colleague, we believe that further explication of our reasoning is appropriate here.

Under Section 8(b)(1)(A) of the Act, it is an unfair labor practice for a labor organization to "restrain or coerce employees in the exercise of rights guaranteed in Section 7." Included among those rights is the right to refrain from

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[4] The Trial Examiner's reference to a "compounded" violation of Section 8(b)(1)(A) perhaps implies that the violation is merely derivative. On the contrary, we find, as spelled out more fully herein, that the very imposition of a fine on nonmembers violates the Act, regardless of the amount of the fine.

engaging in any of the protected concerted activities enumerated at the beginning of Section 7.

The levy of a fine is calculated to force an individual both to pay money and to engage in particular conduct against his will. This is true regardless of the ultimate collectibility of the fine. A man who is held up at gunpoint is coerced whether or not the gun is loaded. As with the levy of a fine, the coercion lies in the calculated threat and, as has been held, the "argument that the fines imposed were not collectible in a court of law, even if accepted is beside the point."[5] The imposition of a fine has immediate coercive consequences. Faced with the possibility of action against him, the employee may well be, for practical purposes, impelled to forego his statutory right not to honor the Union's picket line rather than risk involvement in a lawsuit whose outcome he cannot predict.[6] Or, should he choose to take that risk, he will find it necessary to hire counsel whose services he ordinarily would not require.

The Board has long recognized that a fine is inherently coercive.[7] Yet in situations where a union imposes disciplinary fines on its *members* the Board has held that the union does not violate Section 8(b)(1)(A).[8] The basis of the Board's holdings in these early fine cases was the proviso

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[5] See *N.L.R.B.* v. *American Bakery and Confectionery Workers' Local Union 300*, 411 F.2d 1122, 1126, (C.A. 7), enfg. 167 NLRB 596.

[6] We do not share the confidence of our dissenting colleague in the ability of the ordinary employee to evaluate the ultimate legal consequences of the union's act. Nor would we require him to attempt to do so.

[7] See e.g. *Minneapolis Star & Tribune Co.*, 109 NLRB 727, 738.

[8] *Ibid. See also Local 283, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-AFL-CIO (Wisconsin Motor Corp.)*, 145 NLRB 1097; *Local 248 et al., United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO (Allis-Chalmers Mfg. Co.)*, 149 NLRB 67.

to Section 8(b)(1)(A), which exempts "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership" from the coverage of that section. Although a union's membership rules may well be coercive, their enactment is specifically protected by the Act. In *Minneapolis, supra,* the Board construed the levy of the fine as the prescription of a rule with respect to the retention of union membership, and held that the union's conduct, which was protected by the proviso, therefore did not violate Section 8(b)(1)(A).

In affirming the Board's conclusions in *Allis-Chalmers,* the Supreme Court held that the body of Section 8(b)(1)(A) was not intended to reach the conduct of a labor organization in imposing and enforcing a fine upon its members for crossing an authorized picket line.[9] Thus, the Court found it unnecessary to pass on the Board's holding that the proviso protected the union's conduct. Nevertheless, the basis of the Court's holding was the underlying relationship between the union and its members. Throughout the opinion, the Court emphasized the right of unions to regulate their own internal affairs. Reference was made to the "contract theory" of union membership. And, finally, the Court cited the proviso to Section 8(b)(1)(A) as offering "cogent support for an interpretation of the body of Section 8(b)(1)(A) as not reaching the opposition of fines and attempts at court enforcement."

The significance of the membership relationship is that it establishes the union's authority over its members. In joining a union, the individual member becomes a party to a contract-constitution. Without waiving his Section 7 right to refrain from concerted activities, he consents to the possible imposition of union discipline upon his exercise of that right.[10] But the contract between the member and

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[9] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175.

[10] The power to discipline recalcitrant members is essential to the union's self-preservation. This coercive power is protected by the proviso to Section 8(b)(1)(A).

the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished.

In the case at bar, the Union's right to discipline employees terminated upon the employees' submission of their letters of resignation.[11] The attempted imposition of discipline for subsequent conduct was beyond the powers of the Union.[12] It was not consented to by the employees. Nor, in our view, was it protected by the proviso to the Act.

The holding in *Allis-Chalmers* was carefully restricted to the facts of that case. The Court expressly refused to pass on the legality of the imposition of a fine upon "limited members" of the union[13] It appears to us that in this reservation there was the implication that such a fine when levied against nonmembers constitutes a form of restraint and coercion proscribed by Section 8(b)(1)(A). The decisions in two subsequent fine cases reinforce that implication.

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[11] The Union takes the position that voluntary resignation from its ranks is impossible of achievement because its constitution and by-laws set forth no procedure for such resignations. As this argument is contrary to long-standing Board precedent, we reject it here. See *Communications Workers of America, CIO (New Jersey Bell Tel. Co.)*, 106 NLRB 1322, enfd. 215 F.2d 835 (C.A. 2); *Local Union No. 621, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO (Atlantic Research Corp.)*, 167 NLRB 610; *District Lodge 751, International Association of Machinists & Aerospace Workers, AFL-CIO (Boeing Co.)*, 173 NLRB No. 71. Moreover, as indicated *infra*, the Supreme Court in the *Scofield* case expressly sanctioned the strategy of leaving the union to avoid discipline.

[12] The Union's disciplinary authority was, as we hold, limited to conduct engaged in during the period of membership.

[13] While the court did not specifically refer to the fining of nonmembers, the cited reservation indicates the relevance of the membership issue.

In its recent *Scofield* opinion,[14] the Supreme Court summarized its construction of Section 8(b)(1)(A) as follows:

> [The section] leaves a union free to enforce a properly-adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced *against union members* who are free to leave the union and escape the rule. [Emphasis supplied.]

This suggests that the prohibitions of Section 8(b)(1)(A) encompass union rules which do not conform with the enumerated qualifications. Included in this latter category is a rule enforced against nonunion members. By observing that members could "leave the union and escape the rule," the Court seems to have envisaged the possibility that union members could, indeed, resign membership and avoid discipline.

In the *Shipbuilding Workers* Case,[15] the Supreme Court found unlawful a union's attempt to discipline members for filing charges with this Board before exhausting their intra-union remedies. The Court construed Section 8(b)(1)(A) as assuring a union freedom of self-regulation only "where its legitimate internal affairs are concerned." But the imposition of discipline upon nonmembers can hardly be deemed an internal affair.

Our dissenting colleague treats *Allis-Chalmers* as if it existed in a vacuum, overlooking subsequent decisions and the statutory provisions themselves. But to extend the *Allis-Chalmers* doctrine beyond the perimeters of the situation there involved is to emasculate the provisions of Section 8(b)(1)(A). Such a result can hardly have been intended by the Supreme Court. It should not be reached here. In the interplay between the statutory policy to prevent coer-

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[14] *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423.

[15] *N.L.R.B.* v. *Marine & Shipbuilding Workers*, 391 U.S. 418.

cion of employees for exercising Section 7 rights on the one hand, and the policy to permit unions to guide their internal affairs and determine their membership qualifications on the other, the former must prevail where the membership relation which justifies the latter is terminated.

For the foregoing reasons, we find that the Respondent violated Section 8(a)(1)(A) of the Act by imposing disciplinary fines upon resigners from its ranks, for acts committed after their resignations. We shall order the Respondent to cease and desist from such conduct, including attempts to collect the illegal fines through court proceedings.

Also at issue in this case is the legality of the Respondent's imposition of disciplinary fines upon two other categories of strike-breaking employees, those who crossed the picket line without resigning from the union, and those whose resignations were submitted after the commencement of strikebreaking activities but prior to the initiation of disciplinary action against them. The legality of the imposition of discipline upon members for conduct engaged in during the period of membership is clear.[16] Accordingly, we find that the Respondent did not violate Section 8(b)(1)(A) by fining the nonresignees. Nor, in our opinion, does the Respondent's failure to exercise its disciplinary authority with respect to the second group until after the submission of

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[16] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, *supra*. As a majority of the Board (Members Fanning, Brown, and Jenkins), would find that the legality of union fines does not depend on their reasonableness, the Board does not adopt the Trial Examiner's findings, conclusions and recommendations on that issue. See *Arrow Development Corp.*, 185 NLRB No. 22, issued this day. For the reasons stated in his dissenting opinion in the *Arrow* case, Chairman McCulloch would examine the amount of the fines to determine their reasonableness in those situations where the union's imposition thereof and threatened or actual court action to collect such fines would in all other respects be lawful. Where expulsion from membership is clearly the only available method of enforcement, he would consider the size of a fine irrelevant.

their resignations affect the legality of its action. As the source of the Union's disciplinary authority lies in the contractual relationship between the organization and its members, it is to the rules of contract law that we turn in evaluating the Union's conduct. The provisions of a contract are enforceable, and a cause of action can be brought upon them, even after the expiration or termination of the agreement. The rights and duties created by an agreement are extinguished only prospectively by the termination thereof. Thus the termination of some employees' membership here did not affect the Union's subsequent assertion of rights which had accrued to the Union during their earlier period of membership, such as the right to discipline the employees for prior strikebreaking. The effect of these employee's resignations was only to extinguish the Union's future authority over them.

Accordingly, we further find that the Respondent did not violate Section 8(b)(1)(A) of the Act by fining former members for misconduct engaged in prior to their resignations from among its ranks. However, this conclusion does not legitimize the imposition of discipline for conduct engaged in after the resignations. We shall order the Respondent to cease and desist from such action, and to remit a prorata portion of the fine, so that what remains reflects only preresignation conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees, who had resigned from and who were no longer members of the Union,

in the exercise of their rights guaranteed in Section 7 of the Act, by imposing fines against such employees because of their post-resignation conduct in working at the Michoud plant during the September 1965, strike, or by threatening to seek or seeking court enforcement of such fines.

(b) In any like or related manner, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Reimburse or refund to any employees, described in paragraph 1(a) of this Order, who have paid fines under the circumstances described in that paragraph, the amount of said fines imposed because of post-resignation conduct in working at the plant.

(b) Post at its office and meeting hall and at the Michoud, Louisiana plant of the Boeing Company, if the Company is willing, copies of the attached notice, marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 15, shall, after being signed by an authorized representative, shall be posted at the aforementioned locations, in conspicuous places, including all places where notices to employees are customarily posted, and reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by other material.

(c) Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[17] In the event this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that those portions of the complaints as to which no violation has been found be, and they hereby are, dismissed.

Dated, Washington, D. C., August 27, 1970.

JOHN H. FANNING,	Member
FRANK W. MCCULLOCH,	Member
HOWARD JENKINS, JR.,	Member

(Seal)

NATIONAL LABOR RELATIONS BOARD

Member Brown, concurring in part and dissenting in part:

I join with my colleagues in dismissing the allegations of the complaint with respect to the imposition of discipline upon members for conduct engaged in during their period of membership. However, I would also dismiss the remaining allegations concerning the imposition of fines upon purported resigners from the Union.

My colleagues' disposition of this question is predicated upon the premise that an employee, faced with the threat of a union fine, "may well be impelled to forego his statutory right not to honor the Union's picket line rather than risk involvement in a lawsuit whose outcome he cannot predict." But this is what *Allis-Chalmers* was all about. There, a union fine, or the threat of it, expressly designed to force employees to "forego [their] statutory right not to honor the Union's picket line" was nevertheless held not to violate Section 8(b)(1)(A) even though such a fine was collectible, or collected, in court. The Supreme Court reasoned that 8(b)(1)(A) was not intended to apply to this kind of coercion. If, as is the case here, a Union does not violate 8(b)(1)(A) by imposing or threatening to impose a collectible fine, it is difficult to see how a presumably uncollectible fine can be violative of that Section. Even if, as the majority reasons, the employee concerned may not be sufficiently knowledgeable to evaluate the Union's fine

as "un-collectible," and thus feel completely free to cross the picket line with impunity, he is plainly no more coerced than the full-fledged member.

A further consideration, ignored by my colleagues, impels me to this view. Each of the employees involved here, and in all other situations of which I am aware, was a member of the Union in all senses of the word before the strike began. Thus the fealty owed by a member to his union in effect came into play when the strike was authorized and began, and a "resignation" at that point was already a disloyal action from the standpoint of the Union and his fellow members. Moreover, I cannot conceive of a case arising where a union would "fine" someone who had never been its member at all. It is only because the employees here were, in the eyes of the Union, and pursuant to the Union's constitution and bylaws, still Union members, that the fines would have any impact at all upon them. In this respect, whether employees are still members of the Union for purposes of imposition of a Union fine, the proviso to 8(b)(1)(A), in express terms, applies to a union's rules for acquisition or retention of membership.[18]

For all these reasons, I would find no violation of Section 8(b)(1)(A) of the Act in a Union's fining a nonmember or a purported nonmember.

Dated, Washington, D. C., August 27, 1970.

GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

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[18] The cases cited by my colleagues in footnote 11 concern a Union's application of its membership rules to his job tenure, and thus are inapposite to the instant situation, where the rules pertain solely to another internal union matter.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 20-CB-1947

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO
LOCAL LODGE NO. 504, (ARROW DEVELOPMENT CO.)

AND

DAVID O'REILLY, AN INDIVIDUAL

Decision and Order

Upon a charge duly filed on November 14, 1968, by David O'Reilly, an individual, the General Counsel of the National Labor Relations Board, by the Regional Director of Region 20, issued a Complaint and Notice of Hearing on February 26, 1969, against International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 504. The complaint alleged that the Respondent Union had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act, as amended, by imposing a fine of $500 against David O'Reilly for crossing a picket line established by Respondent at Arrow Development Co., and by attempting to collect said fine. On March 3, 1969, Respondent filed an answer denying the commission of any unfair labor practices.

On various dates between April 14, 1969, and April 21, 1969, the parties executed a Stipulation of Facts and a Motion to Transfer Proceeding to the Board by which they waived a hearing before a Trial Examiner and the issuance of a Trial Examiner's Decision and Recommended Order and agreed to submit the case to the Board for findings of fact, conclusions of law, and an order, based upon a record consisting of the Stipulation of Facts and the exhibits attached thereto.

On April 28, 1969, the Board approved the stipulation of the parties and ordered the case transferred to the Board, granting permission for the filing of briefs. Thereafter, the General Counsel, Charging Party, and Respondent filed briefs, and the General Counsel and Respondent filed answering briefs.

Upon the basis of the stipulation, the briefs, and the entire record in this case, the Board makes the following:

Findings of Fact

I. Jurisdiction

Arrow Development Co., hereinafter also referred to as Arrow, is a California corporation with its principal place of business in Mountain View, California, where it is engaged in the manufacture and wholesale distribution of rides for use in amusement parks. During the past year, in the course and conduct of its business, Arrow shipped goods valued in excess of $50,000 directly to customers located outside the State of California.

We find that Arrow is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The Labor Organization Involved

International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 504, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Facts*

Respondent has represented Arrow employees for a number of years. The most recent collective-bargaining contract, which contained a union-security clause requiring membership in the Union as a condition of employment, was op-

erative for the period April 1, 1967, to March 31, 1968. On March 31, Respondent held a meeting, attended by David O'Reilly, at which a strike was authorized by vote of the membership. The strike began on April 1, and lasted until April 29, when a new agreement between Arrow and the Union was reached. During the 4-week period of the strike, O'Reilly crossed the picket line and continued to work, earning $610.62 (net earnings were $511.33) for this period.

At all times material herein, O'Reilly has been a member of the Union. On April 29, 1968, he was notified by the Union that charges had been filed against him for crossing the picket line and working for Arrow during the strike. O'Reilly did not attend the subsequent trial and, in his absence, Respondent's trial committee found him guilty and recommended that he be fined $250. Thereafter, at a regular membership meeting, Respondent's members concurred in the verdict of the committee and voted to fine O'Reilly $500. O'Reilly was so notified.

On August 2, 1968, Respondent brought suit against O'Reilly in the Municipal Court for the San Jose-Milpitas-Alviso Judicial District, County of Santa Clara, State of California, to collect the fine. On November 15, the Union was awarded a judgment for $528.[1] Since that date, Respondent has attempted to collect on the judgment by garnisheeing of O'Reilly's wages.

B. *Contentions of the Parties*

In *Allis-Chalmers*,[2] the Supreme Court held that a union does not violate Section 8(b)(1)(A) by imposing fines against its members for failure to honor an authorized picket line, and by attempting to enforce the fines through court action, for the reason that 8(b)(1)(A) was not in-

[1] Five hundred dollars on the debt, $26.50 in costs, and $1.50 in fees for issuance of the writ of execution.

[2] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175.

tended by Congress to prohibit a labor organization from imposing such fines.[3] The fines in that case ranged from $20 to $100. In *Scofield* v. *N.L.R.B.*,[4] the union had imposed fines of $50 and $100 on members who violated its rule (imposing a ceiling on production for which members could accept immediate piecework pay). In holding the union's foregoing conduct had not violated the Act, the Supreme Court observed, *inter alia*, that there was no showing that the fines were unreasonable in amount. The General Counsel urges in the instant case that "The Supreme Court has thus indicated that a union may violate Section 8(b)(1)(A) if it imposes an unreasonable fine on its members." According to General Counsel, regardless of the reason for the assessment once it is shown that a fine is unreasonably large, "the excessiveness of the . . . penalty makes . . . [the] conduct an unprotected restraint upon employees," since such a penalty necessarily coerces employees with respect to the exercise of their Section 7 right to refrain from assisting a labor organization. Thus, a fine, such as the one in the instant case, which equals or exceeds wages earned during a strike is a total restraint upon an employee's election to work is confiscatory, and, therefore, presumptively unlawful.[5] Finally, General Counsel argues that the Board should not permit the state courts to become the sole arbiters of

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[3] The Board (149 NLRB 67) had reached the same result by application of the 8(b)(1)(A) proviso, a holding which the Supreme Court found unnecessary to pass upon.

[4] 394 U.S. 423.

[5] As analogical support for his position, General Counsel directs the Board's attention to its decision in *Charles S. Skura*, 148 NLRB 679 (approved by the Supreme Court in *N.L.R.B.* v. *Marine & Shipbuilding Workers*, 391 U.S. 418), which assertedly establishes the proposition that union imposition of fines on its members may, in some circumstances, constitute restraint and coercion. However, in that case, it was the reason for the discipline (fining of members who had filed charges with the Board) rather than its severity which made the discipline unlawful.

the question of whether or not a fine is reasonable (an issue which those courts will face in entertaining union suits to enforce fines) because a uniform national policy is required.

The Charging Party, in addition to the contentions advanced by General Counsel, urges the following considerations:

1. The strike vote was not by secret ballot.[6]

2. The Union constitution denies a member the right to select counsel of his choice to represent him during union disciplinary proceedings.[7]

3. The Union attempted to enforce the fine by engaging in conduct prohibited by Section 8(b)(2).[8]

4. After securing a judgment, the Union served the Employer with garnishment papers requiring the Employer to deduct 50 percent of the Charging Party's wages until the fine was satisfied.[9]

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[6] We need not determine whether or not the vote was by secret ballot; the balloting procedure utilized for the strike vote in this case is an internal union matter not governed by any provisions of the National Labor Relations Act.

[7] The Union constitution provides that a member must select his attorney from among the members of the Union. The Board will not review the procedural regularity of this internal union disciplinary proceeding.

[8] The alleged 8(b)(2) conduct has been the subject of a separate settlement agreement, approved by the Regional Director, and thus is not before us in the instant case.

[9] By serving the Employer with garnishment papers, after securing a judgment, the Union was apparently following applicable procedures under California law for collection on a judgment. These procedures are not subject to our review. If the original imposition of the fine was lawful under this Act, and the suit to enforce the fine was also lawful, then it necessarily follows that the Union may avail itself of judgment collection procedures under state law.

5. The Charging Party was not a voluntary union member, but joined the Union solely because of the requirements of the then operative contract union-security clause.[10]

Respondent urges that *Allis-Chalmers* establishes that a union's action in fining a member for crossing a lawful picket line does not conflict with any policy of the Act and, therefore, the amount of the fine is necessarily an internal union matter, removed from Board jurisdiction by the 8(b)(1)(A) proviso. Further, Respondent contends, the fine in this case is reasonable as the Union, in fining the Charging Party an amount roughly equal to his net strike-breaking earnings, has merely deprived him of the fruits of breaking the union rule. Employees who obeyed the rule suffered a comparable loss. Additionally, according to Respondent, a fine may lawfully serve a penal function and, in that case, may be greater "than the monetary benefit that the wrongdoer derives from his offense."[11]

C. *Conclusion*

As early as 1954, the Board held in *Minneapolis Star and Tribune Company*[12] that a union had not violated the Act

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[10] In *Allis-Chalmers*, a form of union-security clause was also in effect, and it was urged that membership was a result of this requirement and not voluntary choice. The Supreme Court held that the relevant question was not what motivated full membership, so long as full membership existed in fact. The Court stated: "Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary." We regard this holding as dispositive of the issue raised by the Charging Party herein.

[11] Respondent also urges that the complaint is defective because it does not specifically allege that the $500 fine is unlawful because the amount is unreasonable. Respondent further contends that the complaint should be dismissed because of the Charging Party's failure to exhaust internal union procedures. In view of our disposition of the case, we need not pass upon these contentions.

[12] 109 NLRB 727.

by imposing a fine of $500 on a member for his failure to perform picket duty during the course of a 1-week strike. The Board concluded that ". . . the proviso to Section 8(b)(1)(A) precludes any such interference with the internal affairs of a labor organization." The Board adhered to this rationale in its more recent decisions in *Wisconsin Motor Corporation*[13] and *Allis-Chalmers Manufacturing Company*,[14] both involving fines and judicial proceedings to enforce the fines. In *Allis-Chalmers* the Board held:

> Here too the Respondents have properly maintained the distinction between treatment of the individual as a member of the Union and treatment of him as an employee. They have imposed the fine only on their own members. It is not alleged that the Respondents ever attempted to affect the jobs or working conditions of any of the fined individuals. Nor is it alleged that the rule prohibiting members from crossing a picket line during a strike is not the legitimate concern of a union or properly the subject matter of internal discipline. It may be said then that the Respondents were engaged only in prescribing and enforcing their own rules with respect to the acquisition or retention of membership. Since, under the proviso, Section 8(b)(1)(A) does not impair the right of a labor organization to do this, it follows that the Respondents did not violate that section.

In affirming the Board's conclusions in *Allis-Chalmers*, the Supreme Court reviewed the legislative history underlying the enactment of the Taft-Hartley Act and held that Section 8(b)(1)(A) was not intended to reach the conduct of a labor organization in fining its members for crossing

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[13] 145 NLRB 1097.

[14] 149 NLRB 67.

an authorized picket line, and seeking court enforcement of those fines.[15] The Court held at 195:

> Thus this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather the contrary inference is more justified in light of the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.

In *Wisconsin Motor*,[16] the Court reaffirmed its holding in *Allis-Chalmers*. It further noted that the Board's decision in *Skura*,[17] and its own decision in *Marine Workers*,[18] establish that if a union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." The net effect of the two lines of cases, said the Court, is that:

> Under this dual approach, § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.

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[15] The Court's rationale made it unnecessary to test the Union's conduct against the 8(b)(1)(A) proviso, as the Board had done.

[16] *Scofield* v. *N.L.R.B.*, footnote 4, *supra*.

[17] Footnote 5, *supra*.

[18] *Id.*

The Court concluded:

> The union rule here left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no discrimination by the employer against any class of employees, and represents no dereliction by the union of its duty of fair representation. In light of this, and the acceptable manner in which the rule was enforced, vindicating a legitimate union interest, it is impossible to say that it contravened any policy of the Act.

Thus, the Court's synthesis of the *Allis-Chalmers* and *Skura* lines of cases makes the initial distinction that 8(b)(1)(A)'s prohibitions extend to union discipline imposed for certain prohibited purposes, but not the severity of otherwise lawful discipline.

Given this precedent, particularly the holding of the Supreme Court that Congress did not, by enacting Section 8(b)(1)(A), undertake to regulate union fines (or court enforcement of same) imposed on members for their failure to honor an authorized picket line, we cannot conclude that Congress nonetheless intended to have the Board regulate the size of these fines and establish standards with respect to their reasonableness. Indeed, as the legal enforceability of the fines is grounded in contract theory, it is obvious that the local courts are the more logical tribunals for the establishment of standards of reasonableness. While in *Wisconsin Motor* the Court noted that the fines in that case were reasonable in amount, the Court addressed itself more fully to this question in *Allis-Chalmers*, stating:

> There may be concern that court enforcement may permit the collection of unreasonably large fines. However, *even were there evidence that Congress shared this concern*, this would not justify reading the Act also to bar court enforcement of reasonable

fines.[32] [Other footnotes omitted and emphasis supplied.]

[32] It has been noted that the state courts in reviewing the imposition of union discipline, find ways to strike down "discipline [which] involves a severe hardship."

Thus, the Court's findings that the fines in those cases were reasonable seems directed to enforcing courts, encouraging those courts to make an independent determination of the reasonableness of the fine in each case presented,[19] in the same fashion as courts limit other union discipline which imposes a severe hardship. Such considerations are of an equitable nature rather than of the character of restraint and coercion with which the National Labor Relations Act treats.[20]

Finally, it is urged that large fines are a deterrent to the exercise of "job rights," and therefore coercive. Apparently our dissenting colleagues would not go this far—for he states that "regardless of the amount of a fine" he would find it clearly privileged under the proviso of 8(b)(1)(A) if enforced solely by internal union methods such as expulsion or suspension, except where the reasons for the fine offends some overriding statutory policy. Thus, it is not

[19] Where Congress desires that the Board make this type of determination, it has said so. Thus, Section 8(b)(5) of the Act authorizes the Board to decide whether or not initiation fees charged of employees required to join a labor organization under a union-security clause are excessive and discriminatory.

[20] Our dissenting colleague suggests that because no contention was made in the 8(b)(1)(A) cases before it that the fines involved were unreasonable, the Supreme Court did not "squarely rule" on the question of reasonableness. To so interpret these decisions is to hold that the Supreme Court will not accord weight to the very considerations it clearly indicates it expects lower courts to apply where collection of such fines is involved. It is more logical to conclude that no specific ruling on this issue was made because reasonableness was not relevant to the 8(b)(1)(A) issue before the Court.

the unreasonableness of the fine which the dissenting opinion finds to be an invasion of the statutory prohibition of Section 8(b)(1)(A), but the attempted collection of the fine through legitimate court proceedings. We find nothing in the Act or in the opinions of the Supreme Court which justifies so limiting a union's method for enforcement of its legitimate internal rules to its own internal procedures.

If our colleagues would further limit "coercive fines" to those actually enforced through external collection proceedings, our differing views would have no meaningful impact, for the courts, under the mandate of the Supreme Court, will have enforced *only reasonable fines*. However, in his view, the threat to collect an excessive fine by internal methods is also coercive. To this suggestion we would pose the query, what threat cognizable under Section 8(b)(1)(A) is there in an uncollectible fine that is not present in a reasonable collectible fine?[21]

The Board has long recognized that, as a practical matter, "virtually all union rules affect a member's employment relationship."[22] However, given the legitimacy of the rule, the only question of relevance to the agency enforcing this Act is "whether, in enforcing the rule, the Union goes outside the area of union-membership relationship and enters the area of employee-employer relationship."[23] The Union has not done so here, nor has it sought to vindicate a policy in conflict with the National Labor Relations Act, and the Act does not authorize this Board to evaluate the

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[21] The Court in *N.L.R.B.* v. *American Bakery & Confectionary Workers*, 411 F.2d 1122, (C.A. 7), did not treat with the argument that a fine, uncollectible in a court of law, was noncoercive but instead "specifically" found the argument "beside the point," because the purpose for which the fines were imposed, namely, to discipline employees for filing charges and cooperating in Board proceedings, would make any fine unlawful.

[22] *Allis-Chalmers Manufacturing Company*, 149 NLRB 67, 70.

[23] *Allis-Chalmers Manufacturing Company, supra.*

fairness of union discipline meted out to protect a legitimate union interest.

Accordingly, we shall dismiss the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. August 27, 1970.

/s/ GERALD A. BROWN, Member
/s/ JOHN H. FANNING, Member
/s/ HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member McCulloch, dissenting:

I am unable to agree with the conclusion of my colleagues that the reasonableness of the amount of a court-collectible fine imposed on a union member for failure to honor his union's picket line during a strike is not relevant to a determination of whether Section 8(b)(1)(A) of the Act has been violated.[24] In my view, the Supreme Court decisions cited by the majority do not command the result they reach, but rather support an opposite conclusion.

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[24] I would reach a different conclusion where the only sanction invoked or threatened for nonpayment of the fine, is expulsion or suspension from union membership. For, regardless of the amount of a fine, its enforcement solely by such internal methods appears clearly to be privileged by the proviso to Section 8(b)(1)(A), except of course in a situation—not the one before us—where the reason for the fine offends some overriding statutory policy. In *Minneapolis Star and Tribune Company*, 109 NLRB 727, relied upon by the majority as Board precedent for its position in this case, it does not appear that there was any actual or threatened court enforcement of the fine there involved.

In neither of the cited cases, as the Court was careful to note, was any contention made that the fines were unreasonable in amount.[25] As the question of reasonableness was therefore not directly before the Court, it was not squarely ruled upon. There are, however, clear indications in these decision, when read together, that a majority of the Court likely would have come to a different result had it appeared in those cases that the fines imposed were unreasonable in amount.

In *Allis-Chalmers*, the opinion for the Court was joined in fully by four justices; Mr. Justice White wrote a separate concurring opinion in which, while agreeing generally with the opinion of the Court, he expressed doubts "about the implications of some of its generalized statements."[26] Four other justices joined in the dissenting opinion written by Mr. Justice Black. In holding that the imposition of court-enforced fines for crossing a union picket line was outside the intended reach of Section 8(b)(1)(A), the Court, in the course of its principal opinion, at several points used the term "reasonable fine." Thus, at page 183, it stated:

> Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a *reasonable fine*. [Emphasis supplied.]

At page 192, the Court rejected, in effect, the argument that its holding might result in the enforcement of unreasonably large fines, stating that such a contention "would not justify reading the Act also to bar court enforcement of *reasonable fines*." [Emphasis supplied.] And Mr. Justice White, explaining why he found the majority more persuasive than the dissent, focused on the reasoning of the Court's opinion

> that since expulsion would in many cases—certainly in this one involving a strong union—be a far more

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[25] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193, fn. 30; *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 430.

[26] *Allis-Chalmers*, 388 U.S. at 199.

> coercive technique for enforcing a union rule and for collecting a *reasonable fine* than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of § 7 rights, nevertheless intended to bar enforcement by another method which may be far less coercive. [Emphasis supplied.] [27]

It is noted, too, that the dissenting opinion in *Allis-Chalmers* interprets the Court's holding as limited in its scope to "a court-enforced *reasonable fine.*" [28] [Emphasis supplied.]

Any doubt that the Court did not intend its holding in *Allis-Chalmers* to extend beyond "reasonable fines" was laid to rest by the Court's subsequent decision in *Scofield.*[29] The Court there summarized its decision in *Allis-Chalmers* as holding that

> a union rule, duly adopted and not the arbitrary fiat of a union officers, forbidding the crossing of a picket line during a strike . . . was enforceable [without violating 8(b)(1)(A)] against voluntary union members by expulsion or a *reasonable fine.* [Emphasis supplied.] [30]

The Court in *Scofield* further stated that

> 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union inter-

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[27] *Id.* at 198.

[28] ". . . the Court's holding boils down to this: a court-enforced *reasonable fine* for nonparticipation in a strike does not 'restrain or coerce' an employee in the exercise of his right not to participate in the strike." [Emphasis supplied.] *Id.* at 200.

[29] *Scofield* v. *N.L.R.B.*, 394 U.S. 423.

[30] *Scofield* v. *N.L.R.B.*, 394 U.S. at 428.

> est, impairs no policy Congress has imbedded in the labor laws, *and is reasonably enforced* against union members who are free to leave the union and escape the rule. [Emphasis supplied.] [31]

It was "this view of the statute," the Court added, that "*must be applied*" [32] in determining whether Section 8(b)(1)(A) was violated by the enforcement of the fine in the case before it. [Emphasis supplied.] Then, after noting the absence of any "showing in the record that the fines were unreasonable," [33] and after finding that the other aforementioned conditions had been satisfied, the Court concluded:

> We affirm, holding that the union rule is valid and that its enforcement by *reasonable fines* does not constitute the restraint or coercion proscribed by § 8(b)(1)(A). [Emphasis supplied.] [34]

The Court's repeated use of the adjective "reasonable" in both *Allis-Chalmers* and *Scofield* to describe the fines there in issue cannot be passed over casually as without significance. By its carefully drawn distinction between "reasonable" and "unreasonable" fines, the Court, it seems to me, meant not only to define the limits of its holdings in these cases, but also to indicate affirmatively that it regarded court-collectible fines which were unreasonable, either in their nature or size, as not serving a legitimate union interest, and therefore not privileged from the proscription of Section 8(b)(1)(A).

Support for the view that the Supreme Court did not read the Act and its legislative history as removing "unreason-

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[31] *Id.* at 430.

[32] *Id.*

[33] *Supra*, fn. 25.

[34] *Scofield*, 394 U.S. at 436.

able" fines from the reach of Section 8(b)(1)(A) is to be found in the language from *Scofield*, quoted above, wherein the Court outlined the test that "must be applied."

Additional support is to be found in the Court's analysis in *Allis-Chalmers* of national labor policy considerations which led it in substantial part to conclude that Congress, in amending the Act in 1947, did not intend Section 8(b)(1)(A) to condemn a union's continued use of reasonable, disciplinary measures. The Court stated in part:

> Integral to this federal labor policy has been the power in the chosen union to *protect* against erosion its status under that policy *through reasonable discipline* of members who violate rules and regulations governing membership. That power is particularly vital when members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement on its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ." [Emphasis supplied.] [35]

Implicit in the Court's analysis of this aspect of national labor policy is the concept that a union has a legitimate interest in imposing *reasonable discipline* upon a voluntary member if needed to *protect* its status as an institution for effective bargaining, even though such discipline also serves to restrain and coerce the member's exercise of his Section 7 right to refrain from engaging in concerted activities. The corollary is that where otherwise lawful discipline oversteps reasonable bounds of needed protection and becomes essentially punitive in nature, it impairs federal labor policy. And since no *legitimate* union interest is then served, it remains within the compass of Section 8(b)(1)(A). Thus, expulsion, or enforcement of a fine solely by expulsion, con-

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[35] *Allis-Chalmers*, 388 U.S. at 181.

stitutes a legitimate exercise of internal union discipline, as it serves only to rid the union of a member not in sympathy with its objectives.[36] So, too, a court-enforced fine for violation of a legitimate rule must be viewed as presumptively protective, and therefore privileged when the amount of the fine, taking into account the character and importance of the ends served by the rule being enforced, is reasonably related to the need for protection. However, if the amount of a fine is such as to be inordinately disproportionate to the needed protection, an inference is warranted that the fine was imposed on the member, not in vindication of a legitimate union interest, but as a reprisal for having exercised a statutorily protected right.[37]

As is indicated in the Supreme Court cases cited above, and as is more concretely reflected in *N.L.R.B. v. Marine & Shipbuilding Workers*, 391 U.S. 418, the determination of whether union disciplinary action violates Section 8(b)(1)(A) involves a balancing process in which the union's interest in maintaining discipline is measured against public policies imbedded in the labor laws. In considering whether

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[36] An exception would be a case such as *Skura*, 148 NLRB 679, where the rule enforced by expulsion invades and frustrates an overriding statutory policy. See also *N.L.R.B.* v. *Marine and Shipbuilding Workers*, 391 U.S. 418.

[37] The imposition of such a disproportionately large fine may also be condemned as arbitrary union action. Although the Supreme Court in *Allis-Chalmers* expressly refrained from deciding, since it was unnecessary to the disposition of that case, "whether 8(b)(1)(A) proscribes arbitrary imposition of fines," the Court elsewhere in its decision at least intimated its view that federal labor policy, as shaped by the Courts, encompasses a policy against unfair or arbitrary conduct by a bargaining representative. Cf. *Vaca* v. *Sipes*, 386 U.S. 171. Though the policy embodied in a rule may not itself be objectionable, a fine for violation of the rule may nevertheless be considered "an arbitrary imposition" if it is so excessive in amount as to bear no fair relationship to the legitimate purposes of the policy served.

a fine, court-enforced, may, at least in certain circumstances, be so excessive in amount as to overcome a union's otherwise legitimate interest in enforcing its internal rules, the policy of the Act protecting employees from interference with their job rights is a consideration which, I believe, should not entirely be ignored.

Thus, where, as in this case, a court-enforceable fine imposed on employee-members for working during a strike is *greater* than the wages earned during the strike, it constitutes a total restraint on their right to refrain from engageng in the concerted activity, different in form but in economic reality the same as if they had been blocked at the plant gate by unlawful violence or a mass picket line. Few employees indeed will feel they have any choice in the matter knowing that if they do violate the union rule and go to work, they will be deprived of all the fruits of their labor. It may perhaps be arguable—a matter on which I now express no judgment—that a fine is justifiable in the protective interests of a union, if it does no more than strip an offending member of the profits of his rule violation. But such an argument is more difficult to sustain where, as here, the fine levied exceeds such gains.[38] In economic effect, to the extent of the excess, the employee is being assessed a sum representing wages he earned *after* the strike is over when the Union no longer needs protection. If the Union had caused the Employer to suspend the fined members without pay for even a brief period after the strike because they had worked during it, there could be no doubt of the Union's violation of Section 8(b)(1)(A). Yet in practical effect what the Union did here, and its coercive impact on employees, is no different. The last consideration, at the very least, it seems to me, would warrant an inference that the fines involved in this case were so excessive in amount in relation to the Union's

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[38] Cf. D. Bok and J. Dunlop, *Labor and the American Community*, 106-107 (1970).

legitimate disciplinary interests as to place them outside the scope of privileged internal union action.[39]

My colleagues take the position that the reasonableness of fines is an issue that must, and should, in all situations, be left for determination solely by local enforcing courts. I am unable to agree. To begin with, I do not share my colleagues' view that the Court's findings in *Allis-Chalmers* and *Scofield* pointing to the reasonableness of the adjudicated fines were simply "directed to enforcing courts" to encourage their examination of reasonableness in fine cases presented to them. That view overlooks the context in which the findings of reasonableness were made and the emphasis given them. Both cases were concerned with unfair labor practice issues only. And, in both, the Court was faced with an argument that though the fines then before the Court might be reasonable in amount, in other cases they might not be; that if *all* fines were ruled exempt from 8(b)(1)(A), it would allow the imposition of court-enforceable fines so large as to be the coercive equivalent of job loss. Considered in this context, I think the only logical conclusion is that the Court stressed the reasonableness of the fines which were before it only because it wanted to ensure that its decisions would not be overinterpreted to mean that unreasonable fines were also exempt from the coverage of Section 8(b)(1)(A). If, as the Court's carefully circumscribed holdings appear to imply, and my own study confirms, unreasonable fines, court collectible, remain subject to the statutory prohibition, it follows that where a fine is attacked as unreasonable in an unfair labor practice proceeding before the Board, the issue of unreasonableness *is* relevant and *must* be decided.

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[39] It is true, of course, that any fine, however small and reasonable in amount, may *indirectly* result in some degree of coercion of employees affecting their job rights. But it does not follow, as the majority appears to reason, that since small fines do not violate the Act, *ipso facto*, the Act is not violated by the imposition of any fine, however large and unreasonable. The situation here presented is one, I believe, in which a difference in degree constitutes a difference in kind.

It is true, as my colleagues suggest, that local courts may, and perhaps must, pass on the reasonableness of fines when suits are brought by unions to collect them. But this does not, of course, foreclose the Board from also doing so in an unfair labor practice proceeding. Nor do I think it appropriate for the Board to defer to another forum, thereby apply in effect a doctrine of "reverse preemption," on an issue so closely intertwined with considerations of statutory and federal labor policies.

Other policy considerations also favor the result I would reach. Thus, to leave an employee to his remedy from a state court might well leave him without any effective relief at all, for the cost of attorney fees alone in many cases will discourage attempts to defeat fines that are excessive. Moreover, I believe this is an area in which uniformity is desirable. Courts are likely to differ widely in their appraisal of what is or is not excessive, and the Board is in the best position to develop fair and uniform standards that are likely to gain general acceptance.

Although the line between what is a reasonable fine and what is not may not always be easy to draw, this is not reason enough for deferral to another forum. Nor is the Board disabled from acting because Congress has laid down no standards. The Board is neither powerless to, nor inexperienced in, making judgments of this kind when relevant to a determination of whether the statute has been violated.[40] Indeed, in a situation such as here presented, I be-

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[40] As noted in the majority decision, Section 8(b)(5) requires the Board in certain situations to determine whether a union initiation fee is "in an amount . . . excessive and discriminatory under all the circumstances." Although Congress set out certain relevant factors for the Board to consider, among others, in making the appraisal required by that section, it does not follow, as the majority seems to imply, that because of the absence of statutory guidelines with respect to the reasonableness of fines, the Board must be deemed without authority to consider that question by developing its own. In *N.L.R.B.* v. *Radio & TV Engineers*, Local 1212, 364 U.S. 573, the Court, in rejecting the Board's contention that it should not make an affirmative award of work under Sec-

lieve that in the discharge of our statutory responsibilities we must do so, unless we are to ignore completely the almost certain coercive impact that clearly excessive fines, backed by actual or threatened court enforcement, will have on statutorily protected rights.[41]

Because I believe my colleagues are in error is not considering on its merits, and deciding, the issue relating to the reasonableness of the fines involved in this case, I note my dissent from the majority decision.

Dated, Washington, D.C., August 27, 1970.

/s/ Frank W. McCulloch, Member
NATIONAL LABOR RELATIONS BOARD

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tion 10(k), since Congress failed to set forth standards to guide it in determining jurisdictional disputes on their merits, said that given this agency's experience in handling similar labor problems, "it need not disclaim the power given it for lack of standards." 364 U.S. at 583.

[41] It is clear that a threat to collect an unreasonable fine may be found unlawfully coercive even if the fine itself is not collectible. An employee confronted with the threat of court collection is not only uncertain of how the court will rule, but is also acutely aware that the costs of litigation come high. The possibility, or even the likelihood, that a court will ultimately refuse to enforce the fine to the extent that it is unreasonable does not withdraw from the threat its coercive impact. The argument that a fine may not be found violative of Section 8(b)(1)(A) if it is not collectible in a court of law has already been specifically considered and rejected in *N.L.R.B.* v. *American Bakery & Confectionary Workers*, 411 F.2d 1122 (C.A. 7), enfg. 167 NLRB 596. It is true, of course, that a threat to collect a reasonable fine may also be coercive in fact, yet is not to be viewed as unlawful for that reason alone. But in the area of union fines a distinction must be drawn between coercion in fact and coercion in law. Under the Supreme Court holdings, as I interpret them, court-enforced reasonable fines, regardless of their impact on employees, are outside the intended reach of Section 8(b)(1)(A)'s ban on coercive conduct; unreasonable fines, however, are not similarly exempt. Since court enforcement of a reasonable fine is lawful, the threat of such enforcement is also so. The opposite is true in the case of an unreasonable fine.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1578

Local 1255, International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioner, Cross-Respondent, versus National Labor Relations Board, Respondent, Cross-Petitioner.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(March 15, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges

THORNBERRY, Circuit Judge: This case is before the Court on the petition of Local 1255, International Association of Machinists and Aerospace Workers, AFL-CIO [the Union] to review and set aside an order of the National Labor Relations Board and on the cross-application of the Board to enforce the order.

On March 17, 1970 the Union struck Mason & Hanger-Silas Mason Company and established a picket line at the Company's Amarillo, Texas plant. Picketing continued from March 17 through April 3, 1970. Theron Howard, Jr., an employee of the Company, was a member of the Union when the work stoppage began. He crossed the picket line and worked throughout the strike. On March 18 the Union received a letter from Howard stating that he wished to be dropped from membership effective March 16, 1970.

On April 4, 1970 a member of the Union preferred intra-union charges against Howard for refusing to honor the picket line. Howard was found guilty as charged and the following penalty was voted by the Union:

> You shall be fined an amount equal to the wages earned by crossing the picket line at Pantex Plant or be expelled from any Local Lodge of the International Association of Machinists until the fine is paid and all other constitutional requirements are fulfilled.

Howard responded by filing an unfair labor practices charge against the Union based on § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C.A. § 158(b)(1)(A).

> § 158(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;
>
> § 157 [§ 7 of the NLRA]:
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

A hearing before a Trial Examiner was waived by both parties and the case went directly to the Board.

The Board found that Howard's resignation was effective when received by the Union on March 18. It held that the Union was free to punish him for crossing the picket line

the two days before he quit the Union, March 17 and 18, but that it was barred by § 8(b)(1)(A) of the Act, *supra*, from disciplining him for postresignation strike-breaking.

This is a case of first impression in this Circuit. The facts are not in dispute. The legal issue before us, stated in its broadest terms, is whether a union may penalize a member, who resigns during a strike and returns to work, for conduct occurring after his resignation.[1] The Act does not provide a

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[1] This issue has apparently arisen only twice before. In *NLRB* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, 1st Cir. 1971, 446 F.2d 369, the court did not decide the issue of a union's right vel non generally to punish postresignation strikebreaking. It held rather than when a union member votes to strike he waives any right he may have under § 7 of the Act to resign from the union and return to work during that strike with immunity from union discipline. In *Granite State* not only had the union members voted to strike, they also had voted unanimously to fine any member who crossed the picket line during the strike. On November 26, 1971 the Board filed a petition for certiorari in *Granite State* (Supreme Court Docket No. 71-711).

More recently another court of appeals decided that a former union member may not be subjected to union discipline for postresignation conduct. *Booster Lodge No. 405, Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO* v. *NLRB*, 1972, D.C. Cir. (Nos. 24687, 24744, February 3, 1972) [hereinafter referred to as the *Boeing case*]. The court distinguished the *Granite State* case, *supra*, on the ground that the penalty there was levied pursuant to a specific vote prior to the strike, while in the case before it the fine was based on a general provision of the union constitution. The *Boeing* court recognized, however, that its decision might conflict with *Granite State*. *Boeing*, *supra*, at note 19.

It is not clear to us whether these cases are in conflict. The *Boeing* court first seems to accept the Board's position that the Act absolutely forbids all union discipline for postresignation conduct of former members. The court then appears to retreat a little and base its decision not on the Act but on the union's constitution, which did not forbid voluntary resignation. The court refused to read in such a provision. The *Boeing* court specifically left open the question of whether a union may prevent resignation during a strike or discipline postresignation strikebreaking if it specifically

clear answer, but instead presents a somewhat conflicting matrix of legislation comprised of §§ 7 and 8(b)(1)(A). § 7 grants employees the right to refrain from concerted union activities except in circumstances not relevant here. § 8(b)(1)(A) makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their § 7 rights. It would thus seem at first glance that an employee-union member is free to eschew participation in strikes without fear of union discipline. This is, however, not the law. Union *members* may be disciplined by various means, including court-enforceable fines. *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

The Board argues, however, that although § 8(b)(1)(A) permits punishment of members, it absolutely prevents a union from imposing any form of penalty on an employee who has resigned from the union for conduct occurring after his resignation is effective. The Union replies that it has an unqualified right to punish members who quit during a strike for crossing the picket line during the remainder of that strike. The Union argues alternatively that the proviso to § 8(b)(1)(A), which permits unions to prescribe their own rules "with respect to the acquisition or retention of membership" in the union, at least gives it the right in the instant case to punish Howard for his postresignation strikebreaking by giving him the choice of paying a fine or being expelled.[2] We find the Union's alternative contention

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sets out these powers in its constitution or by-laws. *Boeing, supra,* at note 20. This footnote suggests that the court did not fully embrace the Board position, since the Act surely may be abrogated by union constitutional or by-law provisions.

We thus believe our resolution of the instant case is compatible with the *Boeing* and *Granite State* cases. To the extent that *Boeing* may be read to support the Board's position that all forms of discipline for postresignation picket-line-crossing are barred by the Act, we respectfully decline to follow it.

[2] The Board argues that the Union's alternate contention should not be considered by this Court, since it was not raised before the Board. 29 U.S.C.A. § 160(e). We disagree. The terms of the

persuasive. Since Howard had already resigned when the penalty was imposed, the thrust of the penalty was to condition readmission to membership on payment of the fine. The sanction for nonpayment of the fine was thus confined to the "acquisition or retention of membership," a domain which is reserved to the Union under the Act.

In the instant case the Board adopted the position it took in the *Boeing* case, *supra* at note 1, that employee's post-resignation acts are wholly beyond the pale of union discipline. The facts in the *Boeing* case were, however, distinguishable from those in the case before us. There the fines were not imposed in the alternative as they were here—that is, the employees were not given a choice of paying the fine or being expelled. In *Boeing* the union filed suit in some cases and threatened suit in others against its former members to collect their fines. In contrast, no suit has been filed in the instant case. Under the terms of the penalty imposed on Howard, see text *supra*, he may not be sued for crossing the picket line, but only may be expelled. We believe the Union's right to expell a member, or deny readmission to an ex-member, for not paying a fine is clearly protected by the proviso to § 8(b)(1)(A). The proviso makes no distinction between acts done while a member and those done while not a member. Either may be taken into consideration in determining who is to be admitted to membership or retained as a member. There is no doubt that the Union could have expelled Howard unconditionally for strikebreaking. It seems that if the Union may absolutely bar him from membership it may conditionally bar him subject to the payment of a fine.

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penalty assessed by the Union, which imposed a fine or expulsion in the alternative, were certainly before the Board during its deliberations. Although the record does not clearly indicate the points raised by both sides during their presentation to the Board, it can fairly be implied that the Board considered the terms of the penalty that was at the heart of the case. The Board had ample opportunity to consider the Union's alternate position.

In summary, we hold only that a union member who resigns during a strike and crosses his union's picket line to return to work may be fined by the union for his post-resignation strikebreaking when the fine is enforceable only by expulsion from the union.[3] We express no opinion on the broader issue raised by the parties but not presented by this case of whether the Act permits a union to levy fines for postresignation conduct that are ostensibly enforceable in court or by any means other than expulsion from union membership.

ENFORCEMENT DENIED

[3] It should be noted that since we interpret Howard's penalty as presenting him with the choice of paying the fine or being expelled, the Union may not sue to enforce the portion of the fine attributable to the two days he crossed the picket line before he resigned as it could have under the Board's decision.

FILED
MAY 31 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1417

BOOSTER LODGE NO. 405,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD

- and -

THE BOEING COMPANY,
Respondents.

RESPONSE OF RESPONDENT, THE BOEING COMPANY, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

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BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

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Respondents.

RESPONSE OF RESPONDENT, THE BOEING COMPANY, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Booster Lodge No. 405, International Association of Machinists And Aerospace Workers, AFL-CIO (the Union), has petitioned the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit

entered in the above-entitled case on March 14, 1972. The opinion of the court below is reported at 79 LRRM 2443, and it is reproduced at pages 5a-33a of the Appendix to the Union's petition. The judgment of the Court of Appeals is found at pages 1a-4a of the Appendix to the Union's petition. The decision and order of the National Labor Relations Board is reported at 185 NLRB No. 23, and is found at pages 34a-35a of the Appendix to the Union's petition.

I. OPINIONS BELOW

On February 18, 1966, The Boeing Company filed an unfair labor practice charge with the National Labor Relations Board alleging the Union had violated Section 8(b) (1) (A) of the National Labor Relations Act[1] by threatening and imposing fines on employees of The Boeing Company who had crossed the Union's picket line and worked during the Union's strike against the Company during the period from September 15, 1965, to October 2, 1965. The Board's General Counsel issued a complaint and after a hearing a Trial Examiner's Decision issued. The General Counsel, the Union and the Company filed exceptions to the Decision. Thereafter, on August 27, 1970, the National Labor Relations Board issued its Decision and Order. (Petitioner's brief, pages 34a-36a).

The Labor Board decided that the Union violated Section 8(b) (1) (A) of the Act: (1) by fining those employees who had resigned from the Union before

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[1]29 U.S.C. Section 158 (b) (1) (A).

they returned to work during the strike, and (2) by fining those employees who had resigned after returning to work, to the extent that the fines were imposed for their working during the strike *after* their resignations (Union's petition, pages 10a; 33a; 42a-44a). The Labor Board further decided that the Union did *not* violate the Act: (1) by fining members for crossing the picket line to work during the strike who did not resign from the Union; and (2) by fining those employees who had resigned *after* returning to work during the strike for work they performed during the strike *prior* to their resignations. (*Ibid.*)

The Board further concluded, contrary to the contentions of The Boeing Company, that it was not the intent of Congress to have the National Labor Relations Board regulate the size of such disciplinary fines and establish standards with respect to their reasonableness, and it dismissed the claim that otherwise legal fines may be rendered violative of the Act if unreasonably large. (Union's petition, pages 10a; 42a).[2]

Both the Union and The Boeing Company filed petitions to review the Board's decision and order with the Court of Appeals for the District of Columbia Circuit, pursuant to 29 U.S.C. Section 160 (f).

With one exception, the Court below enforced the Board's decision and order. The Court below disagreed with the Board with regard to its duty to determine the reasonableness of the fines, stating that "The

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[2]One member dissented. (Union's petition, pages 42a; 58a-67a).

Board's belief that it does not have the obligation of examining the reasonableness of union fines in Section 8 (b) (1) (A) proceedings is based upon a clear misconception of the law and the Supreme Court's relevant decisions." (Union's petition, pages 22a-30a). The Court below remanded the case to the Labor Board for further consideration of the questions relating to the reasonableness of the fines imposed by the Union. (Union's petition, page 33a).

II. QUESTIONS PRESENTED BY THE PETITIONER

The questions, as presented by the Petitioner,[3] are:

> 1. Whether a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strike breaking by resigning from his union subsequent to the commencement of a strike and engaging in strike-breaking after his resignation.
>
> 2. Whether the National Labor Relations Board is empowered to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking.

The Union-Petitioner contends in effect that a member of a union may not escape discipline, particularly fines, for violation of a union rule prohibiting members from working behind a picket line during a strike, by

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[3]Petition, page 2.

resigning from his Union subsequent to the commencement of a strike and working after his resignation. It further contends that the National Labor Relations Board is without power to determine the reasonableness of a fine assessed by a Union against a member for violating its rule against crossing a picket line and working during a strike.

III. POSITION OF THE RESPONDENT, THE BOEING COMPANY

While not filing a brief in opposition to the Union's petition as provided for in Rule 24 of the Court's Rules, The Boeing Company neither acquiesces in nor agrees with the positions and contentions of the Union-Petitioner. In *The Boeing Company v. National Labor Relations Board and Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO,* October Term, 1971, No. * (filed May , 1972), The Boeing Company has petitioned that this Court issue a writ of certiorari to review the aforesaid judgment of the Court below, in which petition the question presented is as follows:

> Whether a union committed an unfair labor practice under Section 8(b) (1) (A) of the National Labor Relations Act and engaged in conduct to "restrain or coerce" employees in the exercise of their rights under Section 7 of the Act to "refrain from" concerted activities, where such union imposed fines on, and attempted to collect such fines from, employees

*The said petition was mailed to Court on May 26, 1972. The filing date and docket number is not yet known.

> who came through the Union's picket lines, regardless of whether or not such employees had resigned their union membership and regardless of whether or not the fines related to the period before, or the period after, resignation.

In the said petition, The Boeing Company argues that there are compelling reasons for re-examination and clarification of the Court's ruling with respect to union fines of members who return to work during a strike. More specifically, therein The Boeing Company is requesting the Court to reconsider and reverse its decision in *N.L.R.B. v. Allis-Chalmers Manufacturing Company*, 388 U.S. 175 (1967).

Should the Court grant the petition of The Boeing Company, and subsequently reverse *Allis-Chalmers* (as it did in a similar situation in *The Boy's Market, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970), the questions presented by the Union-Petitioner become moot. If, however, the Court should grant the writ of certiorari prayed for by the Union-Petitioner, Respondent, The Boeing Company, respectfully reserves its right under Rule 41 of the rules of the Court to file a reply brief, setting forth fully why the Court below is correct in its opinion that the Board must, if such fines are to be permitted by the Court, determine and assess the reasonableness of such fines, and why under the facts and circumstances of the instant case, a union member may not be fined by violating a union rule against crossing a picket line and working for his employer during a strike, without regard to whether or not he resigns from the Union.

RESPECTFULLY SUBMITTED,

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MAY, 1972

CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 33 of the Supreme Court Rules, I certify that I have caused copies of the foregoing Response of Respondent, The Boeing Company, To Petition For Writ of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit to be served on the following persons by mailing three copies of same via air mail, postage prepaid:

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this day of May, 1972.

SAMUEL LANG
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, and THE BOEING COMPANY

No. 71-1563

THE BOEING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

These two petitions seek review of the same judgment of the court of appeals of which the Board has sought review by its petition in *National Labor Relations Board* v. *The Boeing Company*, No. 71-1607. The court of appeals upheld the Board's rulings (1) that the Union violated Section 8(b)(1)(A) of the National Labor Relations Act by fining employees who, following their resignations from the Union during a strike, returned to work and (2) that the Union did not violate that section by fining members who returned to work during the strike either without or before resigning. The court held, however, that, contrary to the Board's ruling, the agency was required itself to determine, before it could uphold the Union fines, whether they were reasonable. The latter ruling is the subject of the Board's petition in No. 71-1607.

1. *The Union's Petition.* The Union's petition (No. 71-1417) challenges the rulings that the fines imposed for returning to work after resignation were unlawful and that the Board is required to determine the reasonableness of the fines. The former issue is the same as that on which the Court granted the Board's petition for certiorari in *National Labor Relations Board* v. *Granite State Joint Board* on March 20, 1972 (No. 71-711), and the decision of the court of appeals on this point conflicts with that of the First Circuit in *Granite State* (446 F. 2d 369). The latter issue is the one on which the Board itself has petitioned. Accordingly, the Board does not oppose the petition in No. 71-1417.

2. *The Company's Petition.* The Company urges this Court to reexamine and overrule *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, which held that a union's fining of ~~employees~~ members who crossed a union picket line during a strike does not violate Section 8(b)(1)(A). This Court, however, reaffirmed the rationale of *Allis-Chalmers* as recently as 1969 (*Scofield* v. *National Labor Relations Board*, 394 U.S. 423), and the Company points to nothing that warrants re-examination of *Allis-Chalmers*. Accordingly, the Company's petition (No. 71-1563) should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JUNE 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 469300 649

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OCT 7 1972

MICHAEL RODAK, JR., CLERK

IN THE

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Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD

-and-

THE BOEING COMPANY

No. 71-1607

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

THE BOEING COMPANY, ET AL.

On Petitions for Writs of Certiorari To The United States Supreme Court of Appeals For the District of Columbia Circuit

BRIEF FOR THE BOEING COMPANY, IN OPPOSITION

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2. Assuming, arguendo, that a union is not precluded by Section 7 of the National Labor Relations Act from fining its members for crossing a picket line, a member may not be so fined if he resigns from the union before or during a strike called by the union. 20

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IN THE
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Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD

-and-

THE BOEING COMPANY

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

THE BOEING COMPANY, ET AL.

On Petitions for Writs of Certiorari to the United States Supreme Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE BOEING COMPANY, IN OPPOSITION

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), and the Solicitor General, on behalf of the National Labor Relations Board (the Board), seek review of the same judgment which The Boeing Company is seeking to have reviewed by its petition in *The Boeing Company v. National Labor Relations Board and Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO*, No. 71-1563. (*Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO v. N.L.R.B.* and *The Boeing Company v. N.L.R.B.*, 459 F. 2d 1143, C.A., D.C., 1972).

In No. 71-1563, *The Boeing Company v. National Labor Relations Board and Booster Lodge No. 405, International Association of Machinists and Aerospace Workers*, The Boeing Company has presented the following question:

> Whether a union committed an unfair labor practice under Section 8(b) (1) (A) of the National Labor Relations Act and engaged in conduct to "restrain or coerce" employees in the exercise of their rights under Section 7 of the Act to "refrain from" concerted activities, where such union imposed fines on, and attempted to collect such fines from, employees who came through the Union's picket lines, regardless of whether or not such employees had resigned their union membership and regardless of whether or not the fines related to the period before, or the period after, resignation.

The Boeing Company submits that the question presented by it should be answered in the affirmative, and that the Court should reverse its decision in *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967). Were this to occur, and The Boeing Company respectfully urges the Court to take such action, the questions sought to be presented by the Board and the Union, stated below, would become moot. The remainder of this brief is addressed to issues that exist if, and only if, the Court declines to take such action.

In No. 71-1417, *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO v. National Labor Relations Board and The Boeing Company*, the Union seeks to present the following questions:

> 1. Whether a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation.
>
> 2. Whether the National Labor Relations Board is empowered to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking.

In No. 71-1607, *National Labor Relations Board v. The Boeing Company Et Al.*, the Board seeks to present the following question:

Whether the National Labor Relations Board, in determining whether a union committed an unfair labor practice by assessing and seeking court collection of a fine against a member for violating a union rule against strikebreaking, is required to determine whether the fine is reasonable in amount.

OPINIONS BELOW

On February 18, 1966, The Boeing Company filed a charge with the National Labor Relations Board alleging that the Union had violated Section 8(b) (1) (A) of the National Labor Relations Act,[1] and a complaint was issued by the Board's General Counsel. The Labor Board decided that the Union violated Section 8(b) (1) (A): (1) by fining employees who had resigned from the Union before they returned to work during the strike, and (2) by disciplining those employees who resigned after returning to work to the extent that the fines were imposed for their working during the strike after their resignations (App. 9a-10a).[2] The Labor Board further found that the Union did *not* violate the Act (1) by fining members for crossing the picket line to work during the strike who did not resign from the Union, and (2) by fining those employees who had resigned after returning to work during the strike for

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[1] 29 U.S.C. Section 158(b)(1)(A).

[2] As stated above, in No. 71-1563, The Boeing Company filed a Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. To avoid needless duplication, we have not reprinted the material contained in the petition in No. 71-1563; the "App." references contained herein are to that appendix.

work they performed during the strike prior to their resignations. (App. 10a). 185 NLRB No. 23.

Both the Union and The Boeing Company filed petitions to review the Board's decision and order with the Court of Appeals for the District of Columbia Circuit pursuant to 29 U.S.C. Section 160(f). The Court of Appeals sustained the foregoing findings of the Board (App. 5a and 10a). However, the Board had also held that the legality of union fines does not depend upon their reasonableness, and it did not adopt the Trial Examiner's findings, conclusions and recommendations on that issue. App. 42a, ftn. 16; App. 62a-107a.[3] The Court of Appeals disagreed with the Board in this respect, and remanded the case for further proceedings in conformity with its views as set out in its opinion. App. 22a-30a; App. 33a.

THE PETITIONS IN NOS. 71-1417 AND 71-1607 SHOULD BE DENIED

The Boeing Company submits that the question presented by its petition in No. 71-1563 should be answered in the affirmative. Should that question be answerd in the affirmative, the questions presented by the Union's petition and by the Board's petition become moot. In any event, however, the petitions filed by the Union and the Board should be denied.

Because of the similarity of the question the Board seeks to present and the second question which the

[3]One Board member dissented in this regard. App. 42a, ftn. 16.

Union seeks to present, that question will be argued first herein, and then the first question which the Union seeks to present will be argued.

1. Assuming, arguendo, that a union is not precluded by Section 7 of the National Labor Relations Act from fining its members for crossing a picket line, the reasonableness of the amount of the fine is a matter to be determined by the National Labor Relations Board.

If this Court is going to continue to permit unions to impose disciplinary fines on employees who work during a strike, then the holding of the court below that "the imposition of an unreasonably excessive disciplinary fine is a violation of Section 8(b) (1) (A)", and that "it is clearly the obligation of the National Labor Relations Board to resolve the question of reasonableness where such an issue is appropriately raised" (App. 25a), is a correct and valid interpretation of the law, particularly in the light of this Honorable Court's opinions in *N.L.R.B. v. Allis-Chalmers Manufacturing Company*, 388 U.S. 175 (1967) and in *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969).

In its decision, the Labor Board relied upon a companion case, *International Association of Machinists and Aerospace Workers, Local No. 504*, 185 NLRB No. 22, 75 LRRM 1008 (1970). Appeal of which is now pending before the Court of Appeals for the Ninth Circuit.

sub nom. David O'Reilly v. N.L.R.B., No. 26,892.[4]

In the instant case, neither before nor during the strike did the Union warn employees that fines or any other action would be taken against those who worked during the strike. App. 7a-8a. After the strike had ended, the sum of $450.00 was arbitrarily determined to be the amount of the fine imposed. App. 53a-53b. The record discloses that the suits filed by the Union were for $630.00 "with legal interest". The figure of $630.00 was based upon $450.00 for the fine, plus $180.00 attorney's fees. App. 55a. The fines were imposed upon employees without regard to whether or not they had resigned from the Union. It was the position of the Union that under its Constitution members could not resign, except "by death". App. 62a; App. 40a, n. 11; App. 72a. Fines had never been levied on members of the Union before for any reason. App. 99a.

The court below stated:

> "The Board's belief that it does not have the obligation of examining the reasonableness of union fines in Section 8(b) (1) (A) proceedings is based upon a clear misconception of the law and the Supreme Court's relevant decisions."[5]

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[4]See No. 71-1417, *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO v. National Labor Relations Board and The Boeing Company*, App. 47a *et seq.* to the petition therein.

[5]App. 23a.

The Court of Appeals considered and flatly rejected the Board's attempt to defer to state courts the adjudication of internal union disputes. As the court noted, the possible existence of a concurrent state court remedy does not relieve the Board of its duty to adjudicate and remedy unfair labor practices under the Act. The court also pointed out the reluctance of state courts to become embroiled in internal union affairs, the compelling need for uniformity, the relative inaccessibility of state courts as compared with the National Labor Relations Board, and the inconsistency between the Board's position and the preemption doctrine.

That the Board must determine the question of reasonableness of union disciplinary fines is made clear from this Court's earlier decisions. In *N.L.R.B. v. Allis-Chalmers Manufacturing Company*, *supra*, at 183, this Court stated:

> "Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a *reasonable fine*." (Emphasis supplied).[6]

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[6]Justice White, in his concurring opinion, observed:

> [S]ince expulsion in many cases — certainly in this one involving a strong union — be a far more coercive technique for enforcing a union rule and for collecting a *reasonable fine* than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of Section 7 rights, nevertheless intended to bar enforcement by another method [court action] which may be far less coercive.

This Court again expressly imposed the sanction against fines which are not reasonable in *Scofield v. N.L.R.B., supra*, 394 U.S. at 428, 430 and 436. Further support for the decision of the court below is found in the language of the court in *National Cash Register Co. v. N.L.R.B.*, ____ F. 2d, ____, 81 LRRM 2001, 2008-9, C.A. 6, 1972.

The refusal of the Board to consider whether the assessment of unreasonable fines is an unfair labor practice in violation of Section 8(b) (1) (A) rested on two grounds. The first was statutory, the Board stating that the National Labor Relations Act "does not authorize this Board to evaluate the fairness of union discipline meted out to protect a legitimate union interest." The second ground was the Board's interpretation of footnote 32 and its accompanying text in the *Allis-Chalmers* decision.[7] In essence, the Board held that it does not have the statutory authority to evaluate the fairness or reasonableness of union discipline, and that allegations concerning the unreasonableness of union discipline can be raised only in state court proceedings for enforcement of the discipline imposed.

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388 U.S. at 198 (emphasis supplied). It is also informative to note the express interpretation given to the *Allis-Chalmers* opinion by the dissenting members of the Court: "[T]he Court's holding boils down to this: a court-enforced *reasonable fine* for nonparticipation in a strike does not 'restrain or coerce' an employee in the exercise of his right not to participate in the strike." 388 U.S. at 200-201 (dissenting opinion of Black, J.) (emphasis supplied).

[7] 388 U.S. 175, 193 and n. 32.

Contrary to the Board and the Union, we submit that the Board not only has the statutory authority to determine the fairness of union discipline, but also a specific *mandate* to do so under this Court's holdings in *Allis-Chalmers* and *Scofield*. In *Allis-Chalmers* and *Scofield* this Court interpreted the imprecise terms "restrain or coerce" of Section 8(b) (1) (A) and established, in clear terms, standards by which union discipline must be measured against the statutory proscription. As the Court noted in *Scofield*, there was "no showing in the record that the fines were unreasonable or the mere fiat of the union leader. . . ."[8] Thus, the Court ruled in *Scofield*, "the union rule is valid and . . . its enforcement by *reasonable fines* does not constitute restraint or coercion proscribed by Section 8(b) (1) (A)."[9] (Emphasis supplied).

This Court has clearly indicated that, in evaluating union disciplinary action against employees under Section 8(b) (1) (A), among the factors the Board must examine in addition to the validity of the union rule, is the reasonableness of the sanction imposed upon the employees. There is nothing in this Court's decisions nor in the Act itself which precludes the Board from considering reasonableness in determining the lawfulness of union discipline within the meaning of Section 8(b) (1) (A).

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[8] 394 U.S. 423, 430.

[9] 394 U.S. 423, 436. See also, Silard, *Labor Board Regulations of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Review 187, 190 (1969).

The Board seeks to avoid the clear mandate of the *Scofield* decision by reliance upon a footnote in the *Allis-Chalmers* decision and its own conclusion that the local courts are the more logical tribunals for the establishment of standards of reasonableness. Board's petition, page 9, footnote 10. That the Board's reliance on the *Allis-Chalmers* footnote is misplaced is clear from the holding in both *Allis-Chalmers* itself as well as this Court's decision in *Scofield*. In the footnote, the Court stated (388 U.S. at 193, n. 32):

> It has been noted that the state courts, in reviewing the imposition of union discipline find ways to strike down 'discipline [which] involves a severe hardship.'

As can be seen there is no indication or even implication in the footnote to suggest that the Court removed the reasonableness of discipline from the Board's scrutiny when resolving cases under Section 8(b) (1) (A). Indeed, the inference the Board should have drawn was to the contrary; the Court dwelled on "*reasonable*" fines, implying a limitation inherent in Section 8(b) (1) (A).

It is inherently unlikely that this Court would have so carefully and repeatedly articulated the requirement that union disciplinary fines be *reasonable* if it meant only to encourage the exercise of the equity jurisdiction of state courts. Moreover, not once has this Court intimated that the Board should *not* consider the reasonableness of the discipline imposed in evaluating union conduct in relation to Section 8(b) (1) (A) of the Act.

In the light of the legislative and interpretive history of Section 8(b) (1) (A), the only logical conclusion to be drawn from the *Allis-Chalmers* and *Scofield* decisions is that the requirement of reasonableness is one critical factor on the scales outlined by the Court which measure the balance between the practical needs of labor organizations, especially during strikes, and the reach of employees' Section 7 right to refrain from striking. Apart from the *Scofield* holding, however, we submit that even cursory consideration of the central position of the Board in the formulation of national labor policy demonstrates the requirement that the Board resolve the issue of reasonableness in determining whether union disciplinary action violates Section 8(b) (1) (A) of the Act.

It was the purpose of Congress in establishing the Board to have *one* agency for the adjudication of issues arising from labor disputes.[10] Only recently, this Court has reaffirmed the "primary responsibility" of the Labor Board for guiding the development of national labor policy.[11] To support the Board's preeminent position in the scheme of national labor policy, the Court in *San Diego Building Trades Council v. Garmon*,[12] set forth the preemption doctrine:

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[10] *Myers v. Bethlehem Shipbuilding Corporation*, 308 U.S. 41 (1938); *Amalgamated Utility Workers v. Consolidated Edison of New York*, 309 U.S. 261 (1940).

[11] *N.L.R.B. v. Raytheon Company*, 398 U.S. 25, 28 (1970).

[12] 359 U.S. 236 (1959).

> "When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[13]

In such situations, the "power and duty of primary decision lies with the Board," rather than with one or several other tribunals, for the sensible reason that "[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."[14] Congressional concern for a coherent national labor policy naturally manifests itself in a corollary interest in "uniform application of its substantive rules [avoiding] diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies."[15]

The desirability of uniformity, the basis for the preemption doctrine in the labor law area, is especially strong in cases like the instant one. Not only is the assessment of an unreasonably large disciplinary fine "arguably" an unfair labor practice within the terms of Section 8(b) (1) (A) of the Act, but the resolution of the reasonableness issue in this case is essential

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[13]359 U.S. 236, 245. Accord, *International Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Company*, 397 U.S. 195, 200 (1970).

[14]*Garner v. Teamsters Union*, 347 U.S. 485, 489, 490-91 (1953).

[15]*San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243, quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490.

to the clarification of union disciplinary powers under the Act. To abstain from deciding the question is to deny that the Court in *Allis-Chalmers* and in *Scofield* has restricted union action within the bounds of reasonableness where the discipline affects employees' Section 7 rights. To leave the decision of the limits of union action under Section 8(b) (1) (A) to case-by-case adjudication in state courts is to invite precisely that conflict of substantive rules of law repugnant to federal labor policy. We cannot believe that, although the Supreme Court decided in *Garmon* that "to allow the States to control which is the subject of national regulations (sic) would create potential frustration of national purposes," it would now, as the Board and the Union suggest, leave to the state courts a decision so vital to a uniform national labor policy as the permissible infringement of employees' Section 7 rights by labor organizations.[16] Having described "the multitude of activities regulated by Sections 7 and 8 of the National Labor Relations Act" as "one of the most teasing and frequently litigated areas of industrial relations," we cannot be led to believe that this Court would leave to the myriad state courts the task of balancing union and employee interests under the Act.[17] Indeed, this Court has clearly stated that "the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumula-

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[16] 359 U.S. 236, 244.
[17] 359 U.S. 236, 241.

tive experience . . ." (359 U.S. at 242). Thus, the Board's determination to abstain from deciding the question of the reasonableness of the fine assessed in this case in favor of adjudication by the state courts is a renunciation of its role in the formulation and administration of federal labor policy, and completely contrary to this Court's mandate in *Garmon, Allis-Chalmers* and *Scofield.*

Thus, if we are to assume that a union has any power whatever to discipline employees for voluntarily crossing a picket line, there is absolutely no support for the arguments of the Board and the Union that the Act does not allow the Board to consider reasonableness as a factor in determining whether union discipline conflicts with the proscriptions of Section 8(b)(1)(A) of the Act. Such a conclusion certainly cannot be drawn from the legislative history, this Court's interpretation of the Act, nor from the proviso to the Section.[18] Indeed, the Board's conclusion flies in the face of explicit indications in *Scofield* and *Allis-Chalmers* to the effect that lawful union discipline depends, in part, on the reasonableness of the punishment imposed.

It is submitted that if "reasonable" fines may be imposed, as previously contemplated by the Court in *Allis-Chalmers* and in *Scofield*, then the Board, with its expertise, is the proper tribunal to determine the reasonableness of the amount of the fine. We submit that the opinion of the court below is consistent with

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[18]The proviso does not apply where union conduct restrains and coerces the exercise of Section 7 rights, for no matter what internal union interest is involved, it must yield to the overriding statutory freedoms of the employees.

the dissenting opinion of then Chairman McCulloch in *International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 504 (Arrow Development Company)*, 185 NLRB No. 22, 75 LRRM 1008. Chairman McCulloch stated (75 LRRM at 1011-14):[19]

> "I am unable to agree with the conclusion of my colleagues that the reasonableness of the amount of a court-collectible fine imposed on a union member for failure to honor his union's picket line during a strike is not relevant to a determination of whether Section 8(b)(1)(A) of the Act has been violated. In my view the Supreme Court decisions cited by the majority do not command the result they reach, but rather support an opposite conclusion.
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> In neither of the cited cases, as the Court was careful to note, was any contention made that the fines were unreasonable in amount. As the question of reasonableness was therefore not directly before the Court, it was not squarely ruled upon. There are, however, clear indications in these decisions, when read together, that a majority of the Court likely would have come to a different result had it appeared in those cases that the fines imposed were unreasonable in amount.
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> In Allis-Chalmers, the opinion for the Court was joined in fully by four justices; Mr. Jus-

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[19]Footnotes omitted. See also App. 58a *et seq.* to the petition of the Union in No. 71-1417.

tice White wrote a separate concurring opinion in which, while agreeing generally with the opinion of the Court, he expressed doubts 'about the implications of some of its generalized statements'. Four other justices joined in the dissenting opinion written by Mr. Justice Black. In holding that the imposition of court-enforced fines for crossing a union picket line was outside the intended reach of Section 8(b)(1)(A), the Court, in the course of its principal opinion, at several points used the term 'reasonable fine'. Thus, at page 183 it stated:

> Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a *reasonable fine.* (Emphasis original).

* * * *

The Court's repeated use of the adjective 'reasonable' in both Allis-Chalmers and Scofield to describe the fines there in issue cannot be passed over casually as without significance. By its carefully drawn distinction between 'reasonable' and 'unreasonable' fines, the Court, it seems to me, meant not only to define the limits of its holdings in these cases, but also to indicate affirmatively that it regarded

court-collectible fines which were unreasonable, either in their nature or size, as not serving a legitimate union interest, and therefore not privileged from the proscriptions of Section 8(b) (1) (A).

Support for the view that the Supreme Court did not read the Act and its legislative history as removing 'unreasonable' fines from the reach of Section 8(b) (1) (A) is to be found in the language from Scofield, quoted above, wherein the Court outlined the test that 'must be applied'."

Chairman McCulloch further stated:[20]

"Other policy considerations also favor the result I would reach. Thus, to leave an employee to his remedy from a state court might well leave him without any effective relief at all, for the cost of attorney fees alone in many cases will discourage attempts to defeat fines that are excessive. Moreover, I believe this is an area in which uniformity is desirable. Courts are likely to differ widely in their appraisal of what is or is not excessive, and the Board is in the best position to develop fair and uniform standards that are likely to gain general acceptance."

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[20] *Id.* at 113-14.

In *N.L.R.B. v. Radio and Television Broadcast Engineers Union*, 364 U.S. 573 (1961), the Court, in rejecting the Board's contention that it should not make an affirmative award of work under Section 10(k) of the Act, since Congress failed to set forth standards to guide it in determining jurisdictional disputes on their merits, said that given the Board's experience in handling similar labor problems, "the Board need not disclaim the power given it for lack of standards."[21] Since that decision, the Board has developed "standards" for making affirmative awards in jurisdictional disputes. See, e.g., *IBEW Local 743*, 185 NLRB No. 106, 75 LRRM 1164 (1970). Just recently the Board exercised its experience and concluded that a union violated Section 8(b)(5) of the Act[22] by imposing excessive initiation fees which, according to the Board, restrained and coerced employees in their right to join the union. In so doing, the Board pointed to such factors as the fee being six times greater than the weekly wage of employees belonging to the union, and that it was twice as large as that of the union's sister local. *Longshoremen, I.L.A., Local 1419*, 186 NLRB No. 94, 75 LRRM 1411 (1970).[23] The Board can just as well exercise its experience in determining whether or not fines are "reasonable", if fines are to be permitted in such cases.

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[21]364 U.S. at 583.

[22]29 U.S.C. Section 158(b)(5).

[23]See also *N.L.R.B. v. Television & Radio Broadcasting Studio Employees*, 315 F. 2d 398, CA 3, 1968.

2. Assuming, arguendo, that a union is not precluded by Section 7 of the National Labor Relations Act from fining its members for crossing a picket line, a member may not be so fined if he resigns from the union before or during a strike called by the union.

Again, it is the position of The Boeing Company that all fines levied by unions against employees for exercising their statutory right under Section 7 of the Act to refrain from engaging in concerted activities by working during a strike restrain or coerce employees in violation of Section 8(b) (1) (A). The Board, relying primarily on *Allis-Chalmers* and *Scofield, supra*, has concluded that a union violates the Act only when fines are imposed on former members for their post-resignation conduct.

The Court of Appeals, in agreement with the Board, affirmed the conclusion that "the Union violated Section 8(b) (1) (A) by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage". The court below included in this finding the Union's effort not only to discipline those employees who had resigned from membership before engaging in any strike-breaking, but also the Union's imposition of fines on those who resigned during the period of their strikebreaking, to the extent that such discipline was imposed as a result of their post-resignation conduct. The court below noted that "since the imposition of fines under such circumstan-

ces violated the policies underlying the National Labor Relations Act and had effects outside the area of internal Union affairs, they were clearly 'coercive' within the meaning of Section 8(b)(1)(A)". The court further noted that the fact that the fines might not have been collectible in a subsequent collection suit does not detract from the fact of their coerciveness at the time they were imposed.[24]

This court, on March 20, 1972, granted the Board's petition for certiorari in *National Labor Relations Board v. Granite State Joint Board*, No. 71-711, wherein the Court of Appeals for the First Circuit dealt with the post-resignation question.[25] In *Granite State*, in denying enforcement of the Board's order, the Court of Appeals for the First Circuit noted that *Granite State* may be critically distinguishable from the instant case.[26] In the instant case, the court below embraced the distinctions suggested by the First Circuit and stated that "we believe that the [*Granite State*] decision is inapposite to the present fact situation."[27] The court below also stated, "To the extent that the First Circuit's decision in *Granite State* may be read to support Booster Lodge 405's position here, we respectfully decline to follow it."[28] The Union here, in

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[24]App 21a. See also App. 39a-42a.

[25]*N.L.R.B. v. Granite State Joint Board, Textile Workers Local 1029*, 446 F. 2d 369, C.A. 1, 1971.

[26]446 F. 2d 369, 372, n. 5.

[27]App. 18a.

[28]App. 19a, n. 19. The First Circuit's opinion in *Granite State* has received other criticism, See, e.g. Note, 46 Tul. L. Rev. 848, 850-55 (1972).

its petition, recognizes the distinction between this case and *Granite State*. No. 71-1417; Petition, pages 13-14.

Here, the Company and the Union were parties to a collective bargaining agreement which expired on September 15, 1965. Upon the expiration of the contract, the Union commenced a strike against Boeing and began picketing at the Company's Michoud, Louisiana plant, as well as at various other locations. This work stoppage lasted 18 days. On October 2, 1965, a new collective bargaining agreement was signed and the strike ended. App. 6a-7a; 35a. Both the expired and the newly executed agreements contained maintenance-of-membership clauses which required all new employees to notify both the Union and the Company within 40 days after their employment began if they elected not to become members of the Union. It also required that those who became members retain their membership *only during the contract term*. App. 7a; 35a.

During the strike period, after the contract had expired, approximately 143 out of approximately 1900 production and maintenance employees then represented by the Union at the Michoud plant crossed the picket line and reported to work. All of those persons had been members of the Union during the 1963-65 contract period. Some of the employees who worked during the strike made no attempt to resign from the Union during the strike. Approximately 119 submitted their voluntary resignations, in writing, both to the Union and the Company. About 61 employees who resigned did so *before* they crossed the picket line and

returned to work. Another 58 also resigned during the course of the strike, but *after* they had returned to work. However, all resignations were submitted after the expiration of the 1963-65 contract, and before the execution of the new contract, and all were submitted prior to the imposition of any Union disciplinary action, or any threats or warnings of same. Union members were not warned prior to the strike that disciplinary measures could, would, or might be taken against those who crossed the picket line to work. In fact, nc disciplinary action had been imposed on members by Booster Lodge No. 405 prior to that time. App. 7a-8a; see also page 7, *supra*.

In late October or early November of 1965, the Union notified all members and former members who had crossed the picket line and worked during the strike that charges had been preferred against them under the International Union Constitution for "Improper Conduct of a Member" due to their having "accept[ed] employment ... in an establishment where a strike exist[ed]." They were advised of the dates of their Union trials, which were to be held even in their absence if they did not appear, and they were notified of their right to be represented by counsel, *provided* the said counsel was a member of the International Association of Machinists and Aerospace Workers. Under the provisions of the National Union Constitution which permitted the imposition of disciplinary measures, including "reprimand, fines, suspension, or lesser penalty or combination", where a member had been found guilty of misconduct after notice and a hearing, fines were imposed on *all* employ-

ees who had worked during the strike. No distinction was drawn between those employees who had resigned from the Union before returning to work, after returning to work, and those who had not resigned at all. The Union sent out notices to the fined employees that the matter had been referred to an attorney for collection, and the Union has filed some suits against employees to collect the fines. App. 8a. The Union's Constitution and By-Laws contain no provisions permitting its members to resign; in fact, it was the position of the Union before the Board that its members *cannot* resign from it. App. 40a, n. 11; 61a-62a; App. 72a.

It appears to be the position of the Union petitioner that once a strike vote has been taken, all of its members are bound to honor the picket line for the duration of the strike, without regard to the facts and circumstances surrounding the strike vote, and without regard to any and all subsequent events or circumstances.[29] Both the Board and the court below have specifically rejected this contention.[30]

In the event this Court should fail to answer the question presented in No. 71-1563 by The Boeing Company in the affirmative (see page 2, *supra*, and n. 30 herein), then this Court should also deny the review of the first question presented by the Union in No. 71-1417.

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[29]See, e.g., No. 71-1417, Petition, pages 2 and 12-14.

[30]See also App. 13a, n. 7, where the court below refused to reconsider or overrule *Allis-Chalmers*, stating "that it is not our function". The court further stated, "any argument for such reconsideration must be addressed to the Supreme Court itself". This has been done by The Boeing Company in No. 71-1563.

Aside from the significant factual distinctions between the instant case and the *Granite State* case, the rationale the Union apparently would seek to have this Court adopt is erroneous. It appears that the rationale applied by the Court of Appeals for the First Circuit is the rationale the Union would have this Court adopt. The position of the Union and that of the First Circuit completely ignores the language of this Court in *Scofield v. N.L.R.B., supra*, that Section 8(b)(1)(A) "leaves a union free to enforce a properly adopted rule . . . against union members *who are free to leave the union and escape the rule.*"[31] And with regard to *Allis-Chalmers*, the Board itself has observed, "The holding in *Allis-Chalmers* was carefully restricted to the facts of that case."[32]

If *Allis-Chalmers* is allowed to stand, then it stands for nothing more in this regard, than that a union did not commit an unfair labor practice by fining those of its *members* who violated a union rule by working during an authorized strike, and by seeking judicial enforcement of those fines. No where does the Act or the Court impose a *duty* upon a member to refrain from engaging in protected, concerted activities. The Board has correctly held that where a union's constitution is silent with regard to when and how a member may resign, the member may resign at any time. App. 40a; 15a, n. 10; 20a-22a. Moreover, as noted above (page 22), the collective bargaining agreement provided that once an employee becomes a member

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[31]394 U.S. 423, 430. See also 40a, n. 11.
[32]App. 40a.

of the Union he retains his membership only for the life of the contract term.[33] Since the resignations all occurred after the termination of the 1963-65 agreement and before the execution of the new contract, the maintenance-of-membership provision certainly does not limit the rights of the employees.[34] The Union, in the court below, sought to have that court supply language and facts not present in the instant case, but the court below properly and correctly declined to do so.[35]

It is further submitted that the "reliance theory" relied upon by the First Circuit Court in *Granite State* is erroneous as a matter of law,[36] and, in the alternative, if such reliance is not erroneous there as a matter of law, its application here would be erroneous because of the factual distinctions. The record here is void of any evidence as to whether the fined employees participated in the strike vote or as to how they voted. App. 18a, n. 17. The suggestion by the First Circuit in *Granite State* that mutual alliance, analogous to that found in charitable subscription situations, is implicit in all strike votes[37] flies in the face of all realities of life, but particularly with regard to labor and industrial realities of life. The analogy sought to be drawn by that circuit is destroyed by the crucial distinction between a charitable pledge and a vote in favor of a strike. In the former situation, the contributor is fully

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[33]App. 7a; 35a.

[34]App. 19a. See also *N.L.R.B. v. Granite State Joint Board*, 446 F. 2d 369, 372, C.A. 1, 1971.

[35]App. 16a-17a.

[36]446 F. 2d at 373.

[37]446 F. 2d at 372.

aware of the extent of his commitment. In the strike vote situation, however, a union member has no way of gauging the duration, the success or lack of success, or the cost of the strike to him.

The rationale applied by the First Circuit in *Granite State* would emasculate Section 7 from the Act. In fact, that court went so far as to find that the members who voted to strike had waived their right under Section 7 to refrain from union activities.[38] His rights under Section 7 of the Act are as vital to an industrial worker as are the First Amendment rights to a free society, and should be protected accordingly. The traditional test for waiver of a constitutional right is that the waiver must be made with sufficient awareness of the relevant circumstances and likely consequences[39] and must be a voluntary expression of choice.[40]

The instant case presents a good example of why the rationale of the First Circuit Court of Appeals is erroneous. Here, it is unlikely that any employee who voted to strike had any reason to believe that one week before the strike was to begin, the area in which he lived and the plant was located, would be ravaged and devastated by Hurricane Betsy.[41]

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[38] 446 F. 2d at 372-3.

[39] See *Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969) *Brookhart v. Janis*, 384 U.S. 1 (1966); *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Patton v. United States*, 281 U.S. 276 (1930).

[40] See *Brady v. United States*, 397 U.S. 742, 748 (1970). See also *Machibroda v. United States*, 368 U.S. 487 (1962); *Waley v. Johnston*, 316 U.S. 101 (1942); *Chambers v. Florida*, 309 U.S. 227 (1940); *Kercheval v. United States*, 274 U.S. 220 (1927).

[41] See, e.g., App. 72a-73a.

The rationale of the First Circuit in *Granite State* is equally vulnerable on other grounds.[42] The purported analogy between a strike vote and enlistment in the military service[43] is equally inapposite to the facts of industrial life. The point argued by the Union and accepted by the Court of Appeals for the First Circuit ignores the fact that when one volunteers for military service he enlists for a specific period of time. However, neither in *Granite State* nor in the instant case did the Union tell the employees how long the strike would last. Perhaps a different situation would be presented here if the Union had said, "We will be on strike from September 16 to October 2, 1965." Then the employees would have known the duration of the strike, and would have been able to intelligently judge whether or not they could remain off their jobs for that duration. But such was not the case, nor could it have been. The Union was striking in support of its demands in the new contract. Neither the Union nor the Company, much less the employees, can predict how long such a strike would last.[44]

CONCLUSION

The Court should grant the petition for writ of certiorari filed by The Boeing Company in No. 71-1563, and conclude that a union committed an unfair labor practice under Section 8(b) (1) (A) of the Act and en-

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[42]See ftn. 28, *supra*.

[43]446 F. 2d at 372-3.

[44]In *Granite State*, The Court did not reach the question of whether employees who did not participate in the strike vote were free to abandon the strike at any time, or whether their voluntary act in joining the union constituted such a "contract" as to bar such a claim. 446 F. 2d at 374, n. 8.

gaged in conduct to "restrain or coerce" employees in the exercise of their rights under Section 7 of the Act to "refrain from" concerted activities, where such union imposed fines on, and attempted to collect such fines from, employees who came through the Union's picket line, regardless of whether or not such employees had resigned their union membership and regardless of whether or not the fines related to the period before, or the period after, resignation. To do so would render moot the questions presented by the Board and by the Union. However, were this Court to decline to accede to this view, then it would appear that the court below correctly concluded that a union may not fine former members who have resigned for their post-resignation activities. Further, if this Court is going to permit unions to fine their members for exercising their rights under Section 7 of the Act to refrain from engaging or participating in a strike, the question of reasonableness of the amount of the fine is one which the Board must determine.

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October, 1972.

Scofields' Quality Printers, Inc. — New Orleans, La.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY

No. 71-1607

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

THE BOEING COMPANY, AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 459 F.2d 1143 (Pet. 5a-33a).[1] The opinion of the

[1] "Pet." refers to the petition for a writ of certiorari of Booster Lodge No. 405 in No. 71-1417.

National Labor Relations Board is reported at 185 NLRB No. 23 (Pet. 34a-46a). A companion opinion of the National Labor Relations Board is reported as *David O'Reilly*, 185 NLRB No. 23, 75 LRRM 1008 (1970)[2] (Pet. 47a-67a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1972 (Pet. 1a.). The petitions for writs of certiorari were granted on December 18, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board is empowered to determine the reasonableness of a court-collectible fine assessed by a union against a member for violating its valid rule against strikebreaking.

2. Whether, given a union constitution which prohibits a member from "[a]ccepting employment in any capacity in an establishment where a strike . . . exists", a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation.

STATUTE INVOLVED

Section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C. § 151) and its proviso are at the statu-

[2] Remanded to Board, *sub nom.*, *David O'Reilly* v. *N.L.R.B.*, 82 LRRM 2073 (C.A. 9, 1972), to determine the reasonableness of a fine imposed for strikebreaking, Judge Browning dissenting. The reasoning in support of the remand is expressed in *Morton Salt Co.* v. *N.L.R.B.*, 82 LRRM 2066 (C.A. 9, 1972), Judge Browning dissenting.

tory matrix of the controversy. Section 7 of the Act accords employees *inter alia* "the right to refrain" from "concerted activities for . . . mutual aid or protection." Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . . ." A proviso to this prohibition states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

STATEMENT

I. The Strike

The Boeing Company operates a plant at New Orleans, Louisiana, known as the Michoud plant (A. 3). The production and maintenance employees at this plant are represented in collective bargaining by the Union and its parent, International Association of Machinists and Aerospace Workers, AFL-CIO (IAMAW)(A. 3-4). A single employer-wide collective bargaining agreement covers IAMAW-represented units at the Michoud plant and at other facilities of the Company located elsewhere in the United States (*ibid.*) About 1,900 production and maintenance employees work at the Michoud plant (Pet. 35a).

A collective bargaining agreement covering the IAMAW-represented units at the Michoud plant and other Company facilities was in effect from May 16, 1963 through September 15, 1965 (A. 3, Pet. 35a). No accord upon new contract terms was reached upon expiration of the agreement (A. 4, Pet. 35a). A lawful employer-wide strike over the economic issues in dispute, and picketing in support of the strike, began on

September 16, 1965 and ended on October 3, 1965 (A. 4, Pet. 35a; A. 57).

The strike was preceded by a union meeting at which a strike vote was taken (A. 69, 117, Tr. 21). The Constitution of the IAMAW provides that "a strike vote . . . shall be by secret ballot. In order to declare a strike, such vote must carry by a three-fourths majority of those present and qualified to vote" (A. 137). The Constitution further requires that no strike may be declared without the approval of the Executive Council of the IAMAW, except that, "In an extreme emergency, . . . the I.P. [International President] may authorize a strike pending the submission to and securing the approval of the E.C. [Executive Council]" (A. 136-138). The By-Laws of the Union provide that, "The approval of a strike, method of declaring a strike, and the settlement of a strike shall be in accordance with applicable provisions of the IAM Constitution" (A. 151).

A new agreement was reached on October 3, 1965, retroactive to October 2 (A. 4, Pet. 35a; A. 57). The strike and picketing, which lasted eighteen days, embraced the Michoud plant (A. 4, 20, n. 28, Pet. 35a).

The new 1965 agreement, like the old 1963 agreement, contained a union security provision known as maintenance of membership. Under this provision employees who are or become union members are required to maintain their membership during the contract term, but employees who are not members need not join if they give timely written notice that they do not desire to become members (A. 4, Pet. 35a; A. 154-158).

II. The Internal Union Definition of Improper Conduct of a Member and the Internal Union Procedure for Consideration of Alleged Offenses.

The Constitution of the IAMAW defines "improper conduct of a member" and establishes a full trial and appellate procedure to determine the existence and punishment of alleged offenses (A. 142-150).

Among the offenses defined as misconduct of a member is "Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission" (A. 5; 143). The Constitution provides that this offense, like other "actions or omissions" constituting "misconduct by a member," shall "warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing . . ." (A. 5, Pet. 36a; A. 142). Disqualification from holding office for a period not exceeding five years is expressly enumerated as a penalty (A. 147).

To institute a proceeding to determine the existence and punishment of alleged offenses, a member may prefer written charges of misconduct against another member, which shall be filed with the president of the Local Lodge who in turn serves a copy on the accused (A. 143). A trial committee is promptly convened, and its first task is to "conduct an investigation of the charges and decide whether there is sufficient substance to warrant a trial hearing being held" (A. 144). If trial is warranted, the accused is informed "of the charges against him and when and where to appear for trial," and "a reasonable time . . . to prepare his defense" is afforded (A. 144-145). "If a member fails

to appear for trial when notified to do so, the trial shall proceed as though the member were in fact present" (A. 145). "Both the plaintiff and the defendant shall have the privilege of presenting evidence and being represented either in person or by attorney (the attorney being a member of the I.A.M.A.W.)" (A. 145).[3] Full opportunity to be heard and defend is afforded (A. 145-146).

After the conclusion of the trial, the trial committee is required to "consider all of the evidence in the case and thereafter agree upon its verdict of 'guilty' or 'not guilty.' If the verdict be that of 'guilty,' the trial committee shall then consider and agree upon its recommendation of punishment" (A. 146). The trial committee reports its determination and reasons at the next regular meeting of the Local Lodge (A. 146-147). The trial committee first reports its verdict and reasons with respect to guilt or innocence, and its verdict is then "submitted without debate to a vote by secret ballot of the members . . . in attendance" (A. 147). If the members concur in a "guilty" verdict, "the recommendation of the committee as to the penalty" is submitted in a separate report and "voted on by secret ballot of the members then in attendance" (A. 147). "The penalty recommended by the trial committee may be amended, rejected, or another punishment substituted therefor" by the members (A. 147). The mem-

[3] Although not of record in this proceeding, the IAMAW's settled interpretation is "that the word 'attorney' means any member of the IAM, and he does not have to be a licensed lawyer or the member of any bar association." Record, *International Association of Machinists, Oakland Lodge No. 284 (Morton Salt Co.)*, Case No. 20-CB-1776, GC ex. 8, p. 2. See *Sawyers* v. *Grand Lodge, International Association of Machinists*, 279 F. Supp. 747, 756 (E.D. Mo., 1967).

bers may reverse a "not guilty" verdict of the trial committee, and impose the punishment they deem appropriate (A. 147).

The accused is promptly notified in writing of the decision with respect to his guilt or innocence and of the penalty imposed if found guilty. (A. 146-147). The accused or accuser may appeal to the International President of the IAMAW, who is empowered "to affirm or to modify or reverse, in whole or in part, the decision . . . , or to remand the proceeding for further trial . . . , or to impose any penalty or fine which he deems to be required, including expulsion" (A. 147-148). Successive appeals are provided from the decision of the International President to the Executive Council of the IAMAW, and from the decision of the Executive Council to the IAMAW convention, "or to the membership at large by submission" of the appeal "to . . . referendum . . ." (A. 148-150).[4]

III. The Imposition of Fines for Strikebreaking

Some 143 production and maintenance employees, who were members of the Union when the strike began, crossed the picket line and worked at the Michoud plant during all or part of the period of the strike (A. 5, Pet. 35a). Some 24 of these strikebreakers made no attempt to resign from the Union during the strike period (Pet. 35a). The remaining 119 strikebreakers did resign from the Union during the strike period (Pet. 35a). Of these 119, 61 resigned from the Union and returned to work *subsequent* to their resig-

[4] The sufficiency of this procedure was examined and upheld by the Court of Appeals for the District of Columbia Circuit in *I.A.M.* v. *Friedman*, 102 U.S. App. D.C. 282, 252 F.2d 846 (1958), cert. denied, 357 U.S. 926 (1958).

nation, and 58 resigned from the Union but returned to work *before* their resignation (Pet. 35a-36a and n.3).

The Union tried all employees who were members of the Union when the strike began who were known to have worked during the strike, and assessed a penalty against each found guilty of strikebreaking, without regard to whether the accused had resigned from the Union during the strike period or had started to work subsequent to his resignation (A. 4, 11 and n. 11; 126-127). In late October or early November 1965, the appointed trial committee notified each accused (1) that he had been charged with "Accepting employment . . . in an establishment where a strike . . . exists" in violation of the IAMAW Constitution; (2) that the trial committee "has met and feel there is sufficient evidence to hold a trial"; (3) that a trial of the accused had been set for the time and place specified in the notice; and (4) that "you have the right to have an attorney (the attorney being a member of the IAMAW) to defend you. Under the Constitution, if you fail to appear when notified, the trial shall proceed as though the member were in fact present" (A. 6, Pet. 36a; A. 163).

The ensuing proceedings resulted in a "Not Guilty" verdict as to two accused, a "No Fine" disposition as to a third, and a "Mistrial" without retrial as to a fourth (A. 174, 81-82). The remaining accused were found guilty of strikebreaking but a different penalty was assessed against a particular accused depending upon the class within which he fell. Those accused who appeared before the trial committee, apologized, and pledged loyalty to the Union were in effect fined fifty percent of their strikebreaking earnings and disqualified from holding union office for varying periods (A.

6, Pet. 36a; A. 120-121, 130). The exact penalty assessed against the members of this class reads as follows (A. 164):

> The members of Local Lodge No. 405, IAMAW, have assessed the following penalty:
>
> 1. That you be fined $450.00. This fine to be suspended providing you pay 50% of your earnings while working during the strike, and agree to attend all regular meetings of this Lodge during the next twelve (12) months.
>
> 2. That you be denied the privilege of holding office in the IAMAW for the time stated at your trial. If you worked less than three (3) days—one (1) year; three (3) to ten (10) days—three (3) years; ten (10) days or more—five (5) years.

Those accused who did not appear for trial and were found guilty were fined $450 and disqualified from holding office for five years (A. 5, Pet. 36a; A. 122). The exact penalty assessed against the members of this class reads as follows (A. 165):

> The members of Local Lodge No. 405, IAMAW, have assessed the following penalty:
>
> 1. That you be fined $450.00.
>
> 2. That you be denied the privilege of holding office in the IAMAW for a period of five (5) years.

The full $450 fine was assessed against 108 individuals, and the 50-percent-of-strikebreaking-earnings fine against 35 individuals (Pet. 36a, n. 3). All were informed of their right to appeal the decision to the International President of the IAMAW (A. 6, n. 4; 164-165). No appeals were taken (A. 7, n. 4).

Payment of the fines has followed a checkered course. No $450 fine has been paid (Pet. 37a). Reduced fines have been paid in full in eighteen instances and in part in three instances (Pet. 37a; A. 173-174, 81-82). Payments have averaged $40 (Pet. 37a; A. 130), and payments in full have ranged from a low of $10, a mid-point of $54.80, and a high of $120 (A. 173-174, 81-82). On November 3, 1967, the Union wrote to some individuals who had been "fined 50% of the wages"; the Union stated that "your fine has yet to be paid in full", requested that the individual contact the Union "to discuss payment since we are now in the process of turning all fines over to our attorney for collection", and concluded that "Failure to do so could cause your fine to be increased to $450.00 as was noted at your trial" (A. 6, Pet. 37a; A. 166). On February 2, 1966, the Union's attorney had written to 91 individuals fined $450 requesting "immediate payment in full" and noting that "Your failure to respond promptly will require our filing suit against you . . ." (A. 6-7; 168, 81-82). Suit has been instituted against nine individuals in local courts to recover the $450 fine assessed against each (A. 7, Pet. 37a; A. 133-135, 175-176). The Company has undertaken the defense of these suits (A. 7). The outcome of the suits has not been determined (Pet. 37a.).

IV. The Board's Decision

The claim before the Board was that the Union restrained or coerced employees in the exercise of their right to refrain from concerted activity for mutual aid or protection in violation of Section 8(b)(1)(A) of the Act. The claim divided into two parts. First, although the Union's rule against strikebreaking is valid, the Union violated Section 8(b)(1)(A) by fining

members in an *unreasonably* large amount for
ation of the rule, and by seeking or threatening to
collection of that allegedly unreasonable fine by
rt action. Second, independently of the reasonable-
s of the fine, the Union violated Section 8(b)(1)(A)
fining in any amount those persons who had re-
ed from the Union for that strikebreaking activity
which they engaged *subsequent* to their resignation.

he first claim—the reasonableness of the fine—was
nissed by the Board (Pet. 42a, n. 16). It relied
its rationale on its decision in *David O'Reilly*, 185
RB No. 22, 75 LRRM 1008 (1970),[5] which it issued
he same day as the opinion in this case. In *David*
'eilly, one member dissenting, the Board held that,
n the settled validity of a rule requiring members
honor an authorized picket line" and the settled
nissibility of punishing breach of the rule by
ion fines (or court enforcement of same)", Con-
s did not intend "to have the Board regulate the
of these fines and establish standards with respect
heir reasonableness" (Pet. 55a). Rather, related
t is to "the fairness of union discipline meted out
rotect a legitimate union interest" (Pet. 57a-58a),
issue of the reasonableness of a fine is to be deter-
ed by a court in a proceeding to collect or set aside
fine. The "local courts are the more logical tribu-
for the establishment of standards of reasonable-
" (Pet. 55a).

ie Board, one member dissenting, decided the sec-
claim—pertaining to the situation of a person
had resigned from the Union—in favor of the

emanded to Board to determine reasonableness of fine, *sub.*
David O'Reilly v. *N.L.R.B.*, 82 LRRM 2073 (C.A. 9, 1972),
Browning dissenting. See, p. 2, n. 2, *supra*.

view that the Union violated Section 8(b)(1)(A) by fining a person who had resigned from membership for engaging in strikebreaking *subsequent* to his resignation. The premise of the Board's decision is that, while a member is bound to observe his union's valid rules during his period of membership, "the contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished" (Pet. 39a-40a). Accordingly, the Union "violated Section 8(b)(1)(A) of the Act by imposing disciplinary fines upon resigners from its ranks, for acts committed after their resignations" (Pet. 42a). However, as to those resigners who engaged in strikebreaking *before* their resignation, the Union retained "the right to discipline the employees for prior strikebreaking. The effect of these employees' resignations was only to extinguish the Union's future authority over them" (Pet. 43a).

Member Gerald A. Brown dissented from this branch of the Board's decision (Pet. 45a-46a). He would hold that resignation in the midst of a strike does not free a member to engage in strikebreaking; resignation should not be given effect to allow the member to shed his obligation of union fealty at the very moment that it matters most. He stated in part that (Pet. 46a):

> Each of the employees involved here, and in all other situations of which I am aware, was a member of the Union in all senses of the word before the strike began. Thus the fealty owed by a member to his union in effect came into play when the strike was authorized and began, and a "resignation" at that point was already a disloyal action

from the standpoint of the Union and his fellow members. Moreover, I cannot conceive of a case arising where a union would "fine" someone who had never been its member at all. It is only because the employees here were, in the eyes of the Union, and pursuant to the Union's constitution and by-laws, still Union members, that the fines would have any impact at all upon them. In this respect, whether employees are still members of the Union for purposes of imposition of a Union fine, the proviso to 8(b)(1)(A), in express terms, applies to a union's rules for acquisition or retention of membership.

V. The Decision of the Court of Appeals

On review, the Court of Appeals, in agreement with the Board, affirmed its conclusion that "the Union violated Section 8(b)(1)(A) of the N.L.R.A. by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage" (Pet. 21a). However, in disagreement with the Board, the Court of Appeals held that "it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised" (Pet. 25a), and it directed the Board on remand to determine "the questions relating to the reasonableness of the fines imposed by the Union" (Pet. 33a).

SUMMARY OF ARGUMENT

I

The Board holds that it is without power to determine the reasonableness of a court-collectible fine assessed by a union against a member for violating its valid rule against strikebreaking. The issue which this

holding presents is broader than its narrow statement. For, if power exists to evaluate reasonableness, it equally exists to judge any other claim of arbitrariness in the levying of a court-collectible fine. There is no principled basis for distinguishing among claims of irregularity. Accordingly, the core issue is whether the Board is empowered to oversee the internal administration of union discipline in the levying of a court-collectible fine to enforce a valid union rule.

1. The power to determine the reasonableness of a fine or the regularity of its imposition to enforce a valid union rule rests with the courts. To say that this question is also within the purview of the Board is to upset the existing allocation of function in overseeing the administration of union discipline. Reasonableness is a question for judicial determination under state law and the Labor Management Reporting and Disclosure Act. "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 426, n. 3 (1969). ". . . [S]tate courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship'." *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193, n. 32 (1967). "The reasonableness of the fines is a matter for the state court to determine . . . ." *U.O.P. Norplex* v. *N.L.R.B.*, 445 F.2d 155, 158 (C.A. 7, 1971). In short, except as entry into the field is narrowly required to determine whether a union rule offends a policy of the National Labor Relations Act, regulation of internal union affairs is a field from which Congress has excluded the Board. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 237-241 (1971).

2. To permit the Board to enter this field would entail intolerable risks of collision with state courts. States courts regularly and routinely adjudicate the reasonableness of union fines. Were the Board also empowered to determine this question, the Board in the same case might find a fine reasonable which a court might find unreasonable, or the Board might find a fine unreasonable which the court might find reasonable. Since both the Board and the court would be exercising independent jurisdiction, each as competent to act as the other, there would be no basis for according priority between them, nor would either be required to stay its hand in deference to the other. Each would operate concurrently and conflict in result would be resolved by the happenstance of which proceeding ended sooner in a determinative disposition. And if conflict were not resolvable in this way it would not be resolvable at all short of decision by this Court. For the Board surely does not sit as a supervisory tribunal to review or displace judicial judgments. Nor should it sit as a supplementary tribunal additional to the courts to adjudicate claims arising from administration of internal union discipline.

3. Under the statutory scheme of the National Labor Relations Act it is the Board's business to protect an employee's job rights but not his membership rights.

Short of invoking a union security agreement to require a member to pay his union dues and initiation fee, the "policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperilling their livelihood." *Radio*

Officers' Union v. *N.L.R.B.*, 347 U.S. 17, 40 (1954). The object of statutory solicitude is thus job rights. The employee is protected in his status as an employee against reprisal for engaging in or abstaining from concerted activity for mutual aid or protection.

That is one side of the coin. The other side is that, so long as the employee's status as an employee is left alone, the union may discipline the employee as a member for failure to perform a valid membership obligation, and the Union's exercise of its disciplinary authority is none of the Board's affair. As a member, therefore, the employee may be expelled, suspended, fined, reprimanded, or disciplined in other ways, and objection to the means or extent of discipline is the concern of tribunals other than the Board.

The Court of Appeals destroys this basic statutory distinction. It fuses detriment to the employee by impairment of his status as an employee through adverse action against him by his employer, on the one hand, and detriment to the employee by exertion of union discipline against him in his capacity as a member, on the other. Either action may hurt the employee in his pocketbook, but it is the source of the injury, not the fact of its occurrence, which is statutorily determinative. Injury wrongfully sought or exerted through the employer is remediable by the Board; injury wrongfully sought or exerted through internal union discipline is remediable by the courts. A claim that a union fine is excessive relates to the internal ordering of the relationship of the union and its members; its entertainment therefore belongs to the courts and not the Board. A claim of injury does not loose the Board like a pooh-bah to right all perceived evil regardless of the source and incidence of the harm.

4. It is not possible to preserve the statutory bar erected by the National Labor Relations Act against inquiry by the Board into the internal affairs of a union if the Board is to determine the reasonableness of a fine or the regularity of its imposition. It of course does not matter whether the Board gives a union a clean bill of health or finds shortcomings. For it is the fact of the inquiry, not what it turns up, that involves the Board in the union's internal affairs. It is just this involvement which the Act is designed to avoid.

Entanglement of the Board in internal union self-government, were it required to determine the reasonableness of a fine, is vividly illustrated by considering the import of the requirement that the available internal remedy be exhausted before relief is sought from other tribunals. Where an available union remedy is shunted, no extraunion tribunal should ordinarily consider in the first instance a question whose determination would distinctly benefit from full prior union scrutiny, which may be self-corrected if the claim is urged internally, and where forebearance would further the independent interest in union self-government. As Justice Harlan cautioned, "courts and agencies will frustrate an important purpose of the 1959 legislation if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function." *N.L.R.B. v. Marine and Shipbuilding Workers*, 391 U.S. 418, 429 (1968) (concurrence).

Accordingly, if the Board is to be required to oversee union administration of internal discipline, the

exhaustion rule confronts the Board with two equally indefensible alternatives. The Board must either repudiate the principle of exhaustion of internal union remedies, and thus destroy a bulwark of union self-government. Or the Board must consider the sufficiency of such reasons as may be urged to excuse the failure to exhaust, and thus deeply involve itself in probing the interstices of a union's internal affairs. Either way the Board would be heavily in the business of regulating union self-government, a field from which Congress excluded it.

5. Section 8(b)(1)(A) of the Act and its proviso were enacted in 1947. The Board's consistent interpretation of the proviso, from the beginning to the present, is that it places the administration of union discipline to enforce a valid union rule outside its regulatory authority. It is of course settled that an agency's uniform construction of its own statute, especially a contemporaneous construction, "is entitled to great deference." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). And in this case that "prior long-standing and consistent administrative practice must be deemed to have received congressional approval." *Fribourg Navigation Co.* v. *C.I.R.*, 383 U.S. 272, 283 (1966). For the Board's "interpretation of § 8(b)(1)(A) . . . was reinforced by the Landrum-Griffin Act of 1959 which, although it dealt with the internal affairs of unions, including the procedures for imposing fines or expulsion, did not purport to overturn or modify the Board's interpretation of §8(b)(1)." *Scofield*, 394 U.S. at 429. An administrative construction with these credentials should stand.

In sum, given the validity of the union rule which a court-collectible fine is levied to enforce, the reason-

ableness of the fine or the regularity of its imposition pertains to the internal administration of union discipline and is therefore outside the Board's regulatory authority.

II

The union constitution in this case explicitly prohibits a member from "[a]ccepting employment in any capacity in an establishment where a strike . . . exists . . ." (*supra*, p. 5). The members have thus by specific commitment mutually promised one another to refrain from strikebreaking. They have incorporated this promise in the bond which orders their relationship. Through their internal tribunals they have consistently and fairly interpreted their promise as a commitment which binds a member notwithstanding his resignation to abstain from strikebreaking for the future duration of an existing strike. The question thus presented is the reasonableness and validity of this interpretation.

According to the Board, in the absence of an explicit contrary restriction upon the effect of resignation, a member's resignation from his union in the midst of a strike frees him forthwith from his existing union obligation to refrain from strikebreaking in that strike for its future duration. It predicates this conclusion on its view that, as a matter of contract law, the "contract-constitution" "becomes a nullity" upon resignation, and *ipso facto* the "member's duty of fidelity to the union and the union's corresponding right to discipline for breach of that duty are extinguished" instanter (Pet. 39a-40a).

The Board's view of contract law is radically wrong. Treating the union constitution as a contract, it is

elementary that ascertainment of the existence, meaning and consequences of a promise depends as much upon implications of fact and operation of law as it does upon explicit terms. Fleshing out a contract so as to supply the unexpressed but fair and reasonable rule for the intentionally or inadvertently omitted situation is a commonplace in the interpretation of any agreement.

Given this orientation the question is whether a union constitutional provision barring strikebreaking is justly interpreted to mean, where it is silent upon the subject, that a mid-strike resignation frees the member forthwith from his existing union obligation to refrain from breaking the very strike which he was duty-bound to observe when it began. Allowance of strikebreaking is an impossible interpretation. In "every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper purposes . . . ." *Polin* v. *Kaplan*, 257 N.Y. 277, 177 N.E. 833, 834 (1931). This duty of loyal support finds its cardinal expression in the obligation to refrain from strikebreaking Every member depends on every other to withhold his labor from the struck employer in order to make the strike effective. The least that each member is entitled to expect of the other is that all who are pledged to the common cause at the beginning of the struggle will fulfill their obligation to carry through for its duration. Accordingly, a mid-strike resignation from a union, however efficaceous it may be to sever other membership obligations, cannot as a matter of the fair interpretation of the relationship be given the effect of relieving the resigner instanter of his duty to refrain from strikebreaking at the very moment when its observance counts most.

Contrary to the Board (Pet. 41a-42a), there is no "statutory policy" which militates against reading an explicit ban against strikebreaking to imply a continuing duty to refrain from strikebreaking during the existing dispute notwithstanding resignation. This Court held in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191 (1967), that Section 8(b)(1)(A) of the Act does not embrace "a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines." And it does not precisely because the "economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . .' " (*id.* at 182). This necessary maintenance of strike solidarity embraces within its natural scope disallowance of a mid-strike resignation to justify breaking the very strike which the member was duty bound to observe at its inception. The intrinsic nature of a strike commits a union member to stick with it for its duration, and it offends every concept of loyalty and duty to permit mid-voyage defection. The statute does not require a union to permit a mid-strike resignation to be used as an escape hatch to break the strike. The statute is no more hospitable to the strikebreaker-resigner than it is to the strikebreaker-member.

In short, a union constitution prohibiting strikebreaking, faithfully interpreted in keeping with its fair purport, bars treating resignation in the course of a strike as a license to engage in strikebreaking for the future duration of the existing strike, and "statutory policy" does not militate against this implication but is instead quite in harmony with it.

ARGUMENT

I. THE NATIONAL LABOR RELATIONS BOARD IS NOT EMPOWERED TO ASSESS THE REASONABLENESS OF A COURT-COLLECTIBLE UNION FINE IMPOSED TO ENFORCE A VALID UNION RULE AGAINST STRIKEBREAKING.

Narrowly stated the issue on this branch of the case is the validity of the Board's conclusion that it is not authorized to assess the reasonableness of a court-collectible union fine levied to enforce a valid union rule against strikebreaking. The issue, however, is not limited to the Board's power to decide whether a fine is excessive or temperate. For if power exists to inquire into the reasonableness of a fine it equally exists to inquire into any other asserted defect in the imposition of a fine, whether that defect be inadequate specification of charges, insufficient notice of hearing, deficient opportunity to adduce evidence, or any other procedural irregularity. In a word, the size of a fine is not a special, discrete, and confined issue. It is but one of numerous defects which can be asserted to invalidate a fine despite the substantive unassailability of the underlying rule it is designed to enforce. Accordingly, the core issue on this branch of the case is whether the Board is empowered to oversee the internal administration of union discipline in the levying of a court-collectible fine to enforce a valid union rule.

In support of the Board's conclusion that Congress has not reposed this power in it, we shall show that, (1) review of union administration of internal discipline is a judicial function, (2) entry of the Board into this field would bring it into collision with state and federal courts in the judicial discharge of this function, (3) exclusion of the Board from this field

is required by the statutory scheme of the National Labor Relations Act under which the Board's business is to protect an employee's job rights but not his membership rights, (4) inquiry by the Board into union administration of union discipline requires it to probe the internal affairs of a union, an area from which it is statutorily barred, (5) the Board's abstention is in keeping with its contemporaneous and uniform construction of its statute, and is therefore entitled to great weight, and (6) there is no merit in the reasons articulated by the Court of Appeals to support its contrary conclusion which it defends as "intuitively obvious . . . " (Pet. 24a).

A. Introduction; Focusing the Issue.

We begin by restating the immediately relevant statutory provisions. Section 7 of the Act accords employees *inter alia* "the right to refrain" from "concerted activities for . . . mutual aid or protection." Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . . ." A proviso to this prohibition states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

These provisions are brought into focus by three decisions of this Court in which it has considered the relationship of section 8(b)(1)(A) and its proviso to the administration of internal union discipline to enforce union rules: *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *N.L.R.B.* v. *Marine Shipbuilding Workers*, 391 U.S. 418 (1968); *Scofield* v.

N.L.R.B., 394 U.S. 423 (1969). This trilogy establishes two propositions and leaves a third undisturbed:

1. Resort to court to collect a reasonable fine imposed on a member for violation of a valid union rule does not violate the body of section 8(b)(1)(A) without regard to its proviso. In other words, the action taken does not constitute "restraint or coercion," and therefore there is no need to reach the proviso to exonerate the conduct.[6]

2. A union violates the body of section 8(b)(1)(A), and its action is not immunized by the proviso, when it imposes an internal union sanction to enforce a union rule which is invalid because it conflicts with an overriding policy of the National Labor Relations Act. In other words, neither the body of section 8(b)(1)(A), nor its proviso, countenances enforcement of the invalid rule.[7]

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[6] *Allis-Chalmers*, 388 U.S. at 192, n. 29 ("Our conclusion that § 8(b)(1)(A) does not prohibit the locals' actions makes it unnecessary to pass on the Board holding that the proviso protected such actions."); *id.* at 195 ("Thus this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines."); *Scofield*, 394 U.S. at 436 ("... [T]he union rule is valid and ... its enforcement by reasonable fines does not constitute the restraint or coercion proscribed by § 8(b)(1)(A).").

[7] *Scofield*, 394 U.S. at 429 ("... [I]f the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)(A)."); *Marine Workers*, 391 U.S. at 425 ("... [T]he proviso in § 8(b)(1)(A) that unions may design their own rules respecting 'the acquisition or retention of membership' is not so broad as to give the union power to penalize a member who invokes the protection of the Act for a matter that is in the public domain and beyond the internal affairs of the union.").

3. Since none of the three cases presented the question, the Court had no occasion to consider whether the Board is empowered to act in a situation in which a rule is valid but the fine to enforce it is imposed in an amount or manner said to be defective for some other reason. The trilogy therefore leaves undisturbed the Board's settled proposition that, given a valid rule, "the proviso to Section 8(b)(1)(A) immunizes a union from Board remedial action with respect to the enforcement of internal union rules by means other than job discrimination. . . . [T]he Act did not invest it [the Board] with authority to police the internal discipline of the union short of job discrimination."[8]

These three propositions focus the inquiry in this case. The Court in *Allis-Chalmers* authoritatively established the validity of a union rule requiring a member to refrain from strikebreaking.[9] The determination of the validity of this rule, like the determination of the validity of the production ceiling rule in *Scofield*, entailed no probe into a union's internal affairs. Rather the inquiry looked to the compatibility of the rule with the National Labor Relations Act. It simply tested the legality of the rule by external statutory criteria.

But, in this case, given the substantive validity of the rule against strikebreaking, the Board would be required to cross from external substantive validity into internal union administration were it to decide the

[8] *Local 138, Operating Engineers (Skura)*, 148 NLRB 679, 682 (1964).

[9] The Court on December 18, 1972, denied Boeing's petition in which it asked the Court to reconsider *Allis-Chalmers*, *Boeing* v. *N.L.R.B.*, No. 71-1563.

merits of the claim that the size of the fine imposed for violation of the rule was excessive. At issue, therefore, is the correctness of the Board's settled interpretation that Congress has not commissioned it to oversee union administration of internal discipline to enforce a valid rule.

B. Review of Union Administration of Internal Discipline Is a Judicial Function.

It is with the courts, not in the Board, that responsibility rests to oversee a union's internal affairs. Accordingly, to say that administration of union discipline to enforce a valid union rule is outside the Board's regulatory authority is of course not to say that it is beyond effective control. The reasonableness of a fine, and the procedural regularity of its imposition, are questions for judicial determination under state law and the Labor Management Reporting and Disclosure Act (the Landrum-Griffin Act hereafter cited as LMRDA).[10] The arbitrary imposition of union discipline is reached by the judicial route; it is therefore a fully remediable legal wrong.

This is no situation, accordingly, where a claim of arbitrariness must be determinable by the Board or not at all. Rather, the question is one of allocation of function—which tribunals pursuant to what laws have been invested with the responsibility of decision. And the answer, fully compatible with the overall scheme of union regulation, is that a claim of arbitrariness in the administration of union discipline is an issue for judicial determination under state law or the LMRDA, not by the Board under the National Labor Relations Act.

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[10] 73 Stat. 519, 29 U.S.C. § 401 (1959).

When Congress enacted section 8(b)(1)(A) in 1947, tate courts had been adjudicating disputes over un- on administration of internal discipline for more than alf a century.[11] A "body of law establishing stand- rds of fairness in the enforcement of union discipline rew up . . . ." *Allis-Chalmers,* 388 U.S. at 182-183. There was no dissatisfaction with the efficacy or suffi- iency of state judicial control within this field; sec- ion 8(b)(1)(A) was therefore not directed at any roblem concerning union administration of internal iscipline. The legislative history of "§ 8(b)(1)(A) ontain[s] not a single word referring to the applica- ion of its prohibitions to traditional internal union iscipline in general, or disciplinary fines in particular. n the contrary there are a number of assurances by ts sponsors that the section was not meant to regulate he internal affairs of unions." *Allis-Chalmers,* 388 .S. at 185-186. The upshot was, as this Court wrote in 958, that "the protection of union members in their ights as members from arbitrary conduct by unions nd officers has not been undertaken by federal law, nd indeed the assertion of any such power has been xpressly denied. The proviso to § 8(b)(1) of the Act tates that 'this paragraph shall not impair the rights f a labor organization to prescribe its own rules with espect to the acquisition or retention of membership herein . . .' " *International Association of Machinists . Gonzales,* 356 U.S. 617, 620 (1958).

In 1959, Congress enacted the LMRDA, and by that tatute for the first time "Congress did seek to protect nion members in their relationship to the union by

[11] Summers, *The Law of Union Discipline: What The Courts Do Fact,* 70 Yale L.J. 175 (1960).

adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline." *Allis-Chalmers,* 388 U.S. at 194. In particular, in section 101(a)(5) Congress established "safeguards against improper disciplinary action" in the following terms (73 Stat. 523, 29 U.S.C. § 411(a)(5)):

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Thus Congress "enacted only procedural requirements to be observed" (*Allis-Chalmers,* 388 U.S. at 194), and by section 102 entrusted enforcement of these requirements to the federal district courts (73 Stat. 523, 29 U.S.C. § 412).

Accordingly, in view of its passage of the LMRDA in 1959, the "Eighty-sixth Congress was . . . plainly of the view that union self-government was not regulated in 1947." *Allis-Chalmers,* 388 U.S. at 194. And, while Congress in 1959 enacted procedural safeguards in the administration of union discipline enforceable by federal courts, and adopted as well a number of affirmative standards to assure democratic processes, it otherwise left this field still within the dominion of state law. "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield,* 394 U.S. at 426, n. 3. ". . . [S]tate courts, in reviewing the imposition of union discipline, find ways

to strike down 'discipline [which] involves a severe hardship'." *Allis-Chalmers,* 388 U.S. at 193, n. 32.

Whether a particular fine is reasonable or excessive, or the manner of its imposition fair or arbitrary, calls into play no federal labor policy enunciated by the National Labor Relations Act; it presents no question for which the Act suggests a standard or for which the Board has expertise or aptitude. It is not the business of the Act or the Board. It is, instead, a question historically within the current of judicial experience, to be handled as a matter of state associational law as augmented by the LMRDA. In short, except as entry is narrowly required to determine whether a union rule offends a policy of the National Labor Relations Act, regulation of internal union affairs is a field from which Congress has excluded the Board. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 237-241 (1971).

C. Entry of the Board into the Field of Internal Union Discipline Would Bring It into Collision with State and Federal Courts

To permit the Board to enter the field of internal union discipline would entail intolerable risks of collision with state and federal courts. Thus a member who objects to the imposition of union discipline may himself initiate judicial action in a state or federal court seeking relief from the sanction, or he may in a court suit brought by the union to collect a fine defend against the claim by contending that the fine was arbitrarily imposed. Either way judicial intercession to review the union's action is secured. For example, a New Jersey court enforced payment of a union fine levied against a member for crossing a picket line, but

reduced the amount of the fine from $750 to $500.[12] A California court reversed a summary judgment enforcing payment of fines ranging in sums from $42.15 to $523.99 for working during a strike, holding *inter alia* that there was a triable issue of whether "the fines were unreasonably large."[13] Another California court directed entry of judgment requiring payment of a fine of $299 for strikebreaking, observing that "it is settled law in this country that such a fine becomes a debt enforceable by the courts in an amount that is not unreasonably large."[14] A Maryland court upheld a judgment enforcing payment of a $500 fine for strikebreaking, noting that "a fine, to be judicially collectible, must be reasonable."[15]

Were the Board also empowered to adjudicate the reasonableness of the fine, the Board in the same case might find a fine reasonable which a court might find unreasonable, or the Board might find a fine unreasonable which the court might find reasonable. Since both the Board and the court would be exercising independent jurisdiction, each as competent to act as the other, there would be no basis for according priority between them, nor would either be required to stay its hand in deference to the other. Each would operate concurrently in accordance with the following principle:

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[12] *North Jersey Newspaper Guild Local No. 173* v. *Rakos*, 110 N.J. Super. 77, 264 A.2d 453 (N.J. Sup. Ct. App. Div. 1970), pet. for cert. denied, 56 N.J. 478, 267 A.2d 60 (1970).

[13] *L.A. Newspaper Guild, Local 69* v. *Armenta*, 73 LRRM 2078 (Cal. Sup. Ct. App. Dept. 1969).

[14] *Jost* v. *Communications Workers of America*, 13 Cal. App. 3d Supp. 7, 12, 91 Cal. Rep. 722, 725 (Cal. Sup. Ct. App. Dept. 1970).

[15] *Walsh* v. *Communications Workers of America*, 259 Md. 608, 614, 271 A.2d 148, 151 (Md. Ct. of App. 1970).

"Where the judgment sought is strictly *in personam*, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res judicata* in the other." [16] Based on this principle conflict in result between Board and court would be resolved by the happenstance of which proceeding ended sooner in a determinative disposition.[17] And if conflict were not resolvable in this way it would not be resolvable at all short of decision by this Court. For the Board surely does not sit as a supervisory tribunal to review or displace judicial judgments. Nor should it sit as a supplementary tribunal additional to the courts to adjudicate claims arising from administration of internal union discipline.

This case illustrates the problem. Here the Union has brought separate suits against nine individuals in Louisiana courts to recover the $450 fine assessed against each (*supra*, p. 10). The defense that the fine is unreasonable or the manner of its imposition arbitrary is fully triable in the Louisiana courts. For the Board also to take the same issue in hand invites conflicting adjudication with the Louisiana courts and needless exacerbation of state-federal relations. Congress avoided this mischief by keeping the Board out of this field.

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[16] *Penn General Casualty Co.* v. *Pennsylvania*, 294 U.S. 189, 195 (1935). See also, *Ballantine Books* v. *Capital Distributing Co.*, 302 F.2d 17, 19 (C.A. 2, 1962).

[17] What constitutes a determinative disposition in one tribunal so as to conclude proceedings in another tribunal is itself so vexing a question that a rule of law which spares encountering it commends itself on that account alone. 1B Moore's Federal Practice, ¶¶ 0.416[3], 0.416[4], pp. 2251-2283 (1965).

The problem is similarly illustrated in *David O' Reilly*, 185 NLRB No. 23 (1970) (Pet. 47a-67a), the case in which the Board articulated its governing rationale. The record in that case shows that, after protracted judicial proceedings within the California court system, the union was awarded a judgment for $500 in its suit against O'Reilly to collect the fine levied against him for strikebreaking (R. 12, 19-25, 32-38). In those proceedings O'Reilly protested that "the fine of $500.00 [is] unusual, unwarranted, and completely unfair" (R. 23). But the California court rejected that plea. It ruled that "the fine of $500 is a reasonable fine . . ." (R. 32, 35, 38). The Board rightly refused the invitation to reverse that judicial determination and conclude inconsistently with it that the fine was unreasonable. Precisely as Congress intended, the Board avoided the mischief of conflicting adjudication with state courts and needless exacerbation of state-federal relations by keeping out of this field.

Finally, the basis of the Board's entry into the field would be altogether idiosyncratic. All agree that given a valid union rule, the Board has no authority to inquire into union administration of discipline to enforce the rule if the sanction imposed is expulsion from the union or such lesser penalties as suspension, debarment from holding union office for a specified time, exclusion from attending union meetings for a particular period, or reprimand.[18] And there is apparent unanimity of

[18] Mr. Justice Brennan writing for the majority in *Allis-Chalmers*: ". . . [T]he proviso to § 8(b)(1)(A) preserves to the union the power to expel the offending member" (388 U.S. at 183). Mr. Justice White concurring in *Allis-Chalmers*: ". . . [A] union may expel to enforce its own internal rules . . . 'Coercive' union rules

opinion that the Board does not have authority to inquire if the sanction imposed is a fine so long as that fine is enforceable only by expulsion for nonpayment.[19] Accordingly, the Board's point of entry, if it may enter at all, is the union's reservation of authority to secure payment of the fine by court action. But to predicate the Board's authority within the field on the court-collectibility of the fine would be altogether bizarre. The only reason for the Board's entry would be to make sure that the union would not recover a fine in an unreasonably large amount. But that is exactly what the court itself will make sure of before it enters

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are enforceable at least by expulsion" (*id.* at 197-198). And Mr. Justice White observed of Mr. Justice Black's dissent in *Allis-Chalmers* that it does "not question . . . the enforceability of coercive rules by expulsion from membership . . ." (*id.* at 198). Since expulsion is not a prohibited means of enforcement, it of course follows that suspension and other lesser means are not.

[19] Mr. Justice Brennan writing for the majority in *Allis-Chalmers*: "At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment" (388 U.S. at 191-192). Mr. Justice Black dissenting in *Allis-Chalmers*: ". . . I have already indicated that the proviso to § 8(b)(1)(A) may preserve the union's right to impose fines which are enforceable only by expulsion and that expulsion was the common mode of enforcing fines at the time the section was adopted" (*id.* at 214). Member Frank W. McCulloch, dissenting in *David O'Reilly*, 185 NLRB No. 23 (1970), from the Board's conclusion that it was not authorized to assess "the reasonableness of the amount of a court-collectible fine," drew the following distinction: "I would reach a different conclusion where the only sanction invoked or threatened for nonpayment of the fine, is expulsion or suspension from union membership. For, regardless of the amount of a fine, its enforcement solely by such internal methods appears clearly to be privileged by the proviso to Section 8(b)(1)(A), except of course in a situation—not the one before us—where the reason for the fine offends some overriding statutory policy" (Pet. 58a, n. 24). See also, *Local 1255, IAMAW* v. *N.L.R.B.*, 456 F.2d 1214, 1217 (1972), discussed *infra*, p. 87.

judgment for the union. The Board is not needed to do the very job that the court will perform. Furthermore, the court's role is far more natural in the scope of its inquiry than the Board's would be. For a court will not only set aside a fine which is excessive but it will nullify any sanction which is inordinate. And in particular circumstances "expulsion of the members visits a far more severe penalty upon the member than a reasonable fine." *Allis-Chalmers*, 388 U.S. at 183.

Accordingly, truncated and dislocating, the Board's entry into the field would be harmful in the overall scheme of union regulation. Within the scheme, given a valid rule, a claim that a fine to enforce it has been imposed in an unreasonable amount or by arbitrary means is a matter for judicial determination under state law and the LMRDA, not by the Board under the National Labor Relations Act. "The reasonableness of the fines is a matter for the state court to determine . . . ." *U.O.P. Norplex* v. *N.L.R.B.*, 445 F.2d 155, 158 (C.A. 7, 1971).

D. Board Inquiry into Union Administration of Internal Discipline Requires the Board To Cross the Line from Protection of Job Rights, Which Is Its Province, to Protection of Membership Rights, Which Is Not.

Given the enforcement of a valid rule, exclusion of the Board from inquiry into union administration of internal discipline exactly fits the statutory scheme of the National Labor Relations Act. Under that scheme it is the Board's business to protect an employee's job rights but not his membership rights.

Short of invoking a union security agreement to require a member to pay his union dues and initiation fee, the "policy of the Act is to insulate employees'

jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperilling their livelihood." *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40 (1954). The object of statutory solicitude is thus job rights. The employee is protected in his status as an employee against reprisal for engaging in or abstaining from concerted activity for mutual aid or protection. The function of the Board is to safeguard the employee for his protected action or inaction in his status as an employee—in getting a job from an employer, in keeping a job with his employer, in being compensated for his work by his employer, and in enjoying the other emoluments of his work granted by his employer.

That is one side of the coin. The other side is that, so long as the employee's status as a employee is left alone, the union may discipline the employee as a membe for failure to perform a valid membership obligation, and the Union's exercise of its disciplinary authority is none of the Board's affair. As a member, therefore, the employee may be expelled, suspended, fined, reprimanded, or disciplined in other ways, and objection to the means or extent of discipline is the concern of tribunals other than the Board.

The Court synthesized this duality in *Allis-Chalmers*. Under the National Labor Relations Act, it held, "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. at 195. We do not again rehearse the legislative history supporting

this synthesis which the Court fully reviewed in *Allis-Chalmers*. It is enough to recall its purport. The upshot of the history of section 8(b)(2) enacted in 1947—barring a union from causing or attempting to cause an employer to discriminate against an employee in his employment—came to this (388 U.S. at 184-185):

> It is significant that Congress expressly disclaimed in this connection any intention to interfere with union self-government or to regulate a union's internal affairs.
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> * * * * *
>
> Congressional emphasis that § 8(b)(2) insulated an employee's membership from his job, but left internal union affairs to union self-government, is therefore significant evidence against reading § 8(b)(1)(A) as contemplating regulation of internal discipline.

The upshot of the history of section 8(b)(1)(A) and its proviso came to this (388 U.S. at 186, 191-192):

> . . . [T]here are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions.
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> * * * * *
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> . . . [I]t was not the intent of the sponsors in any way to regulate the internal affairs of unions.

Thus, in *Allis-Chalmers*, as put by the Court in *Scofield*, the "Court . . . essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.*, 109 NLRB 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine

a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority. . . ." 394 U.S. at 428. Accordingly, in the Board's words, the statutory regime does not bring the Board's authority into play as long as the union in its enforcement of a valid rule acts on "the status of a member as a *member* rather than as an *employee*." *Scofield*, 145 NLRB 1097, 1104 (1964), affirmed, 394 U.S. 423 (1969) (emphasis in original). And in *Minneapolis Star*, which won the Court's endorsement, the Board identified the abnegating side of this statutory dichotomy in its statement that "the proviso to Section 8(b)(1)(A) precludes . . . interference with the internal affairs of a labor organization." 109 NLRB at 729.

The point of the statutory duality—the Board protecting job rights and other tribunals protecting membership rights—is not that union administration of internal discipline will not affect a member's work or pay. As in *Allis-Chalmers*, union discipline to enforce a union rule against strikebreaking means that a member may receive less in pay than he might otherwise want to earn. As in *Scofield*, union discipline to enforce a union rule against exceeding a production ceiling means that a member may receive less in pay than he might otherwise want to earn. Accordingly, the point of the statutory duality is not that union discipline may not affect work or pay. The point rather is the source from which the effect flows. If the effect on employment is the consequence of the administration of union discipline, the National Labor Relations Act is indifferent to it so long as the union rule is valid; on the other hand, if the effect is the consequence of action

by or pressure on the employer to deny employment or its prerequisites, it is then the concern of the National Labor Relations Act. The Board articulated the distinction as follows in *Scofield* (145 NLRB at 1104):

> Obviously, production and wages are related to jobs. Jobs are related to employees and employees may, if they so desire, be union members. A union rule that a *member* is subject to a fine if he exceeds a production ceiling does not mean that he is subject to such a fine as an *employee*. Nor does it mean that his employment status is affected so long as the Union does not attempt to exact payment of the fine by pressure on his employer or discrimination in his job opportunities. (Emphasis in original.)

This Court affirmed just this distinction. The prohibitions of "§ 8(b)(2) and § 8(a)(3) of the Act" are not implicated "because the union has not induced the employer to discriminate against the member but has merely forbidden the member to take advantage of benefits which the employer stands willing to confer. Those sections are not aimed at completely internal union discipline of union members, even though the discipline may result in the member's refusal to accept work offered by the employer. *Allis-Chalmers* makes this quite clear." *Scofield*, 394 U.S. at 436.

Accordingly, synthesing and preserving this statutory duality, the Court observed in *Scofield*, "As an employee, he may be a 'good, bad, or indifferent' member so long as he meets the financial obligations of the union security agreement . . . . But as a union member . . . he is subject to union discipline." 394 U.S. at 429, n. 5. Yet it is precisely this synthesis that the Court of Appeals unglues in this case by its thinly-veiled direction to the Board that, in determining the reason-

ableness of a fine, it should inquire into whether the amount of the fine unduly cuts into the rule-violating member's strikebreaking earnings and in that sense is said to impair his "employment status" (Pet. 29a-30a):

> One additional consideration is worthy of mention. In its original *Scofield* decision, 145 NLRB 1097, 1104 (1964), the Board expressly indicated that a union had no right to impose any penalty which would "impair the member's status as an employee." This prohibition against union disciplinary action adversely affecting an employee's employment status has been approved by the Supreme Court. *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra,* 388 U.S. at 195; *Scofield* v. *N.L.R.B., supra,* 394 U.S. at 423, 428. While this principle clearly prohibits a union from seeking the suspension or termination of an employee by his employer due to his strikebreaking, its implications may have further application which might be relevant to the present case. Where a disciplinary fine is unreasonably excessive, it may possibly affect the employee's employment status as adversely—and possibly even more adversely—as an illegally obtained employment suspension. On remand, the Board might also consider this protective policy of the Act in determining the reasonableness of the fines in question under Section 8(b)(1)(A).

By this finesse the Court of Appeals destroys the basic statutory distinction endorsed by this Court. It fuses detriment to the employee by impairment of his status as an employee through adverse action against him by his employer however induced, on the one hand, and detriment to the employee by exertion of union discipline against him in his capacity as a member, on the other. The employee may be hurt in his pocketbook by either action, but it is the source of the injury,

not the fact of its occurrence, which is statutorily determinative. Injury wrongfully sought or exerted through the employer is remediable by the Board; injury wrongfully sought or exerted through internal union discipline is remediable by the courts. The fact of injury does not loose the Board like a pooh-bah to right all perceived evil regardless of the limitations within which Congress has carefully cabined its authority. Accordingly, as Judge Browning accurately observed in dissent in *Morton Salt Co.* v. *N.L.R.B.*, 82 LRRM 2066, 2073 (C.A. 9, 1972), "Of course the union could not induce the employer to threaten the member with suspension or discharge as a means of collecting a fine, but this is true whether the fine is reasonable or unreasonable in amount. Absent some such conduct, the mere imposition of an unreasonably large fine would have no effect upon the member's employment status. The fine would be collectible, or would not, whether the employee retained his employment or left it."

E. Board Inquiry into Union Administration of Internal Discipline Would Bring It Deeply into Regulation of the Internal Affairs of Unions, An Area from Which It Is Statutorily Barred, and This Is Especially Apparent with Respect to the Requirement of Exhaustion of Internal Union Remedies, Whether the Board Is To Observe or Abrogate the Requirement.

It is not possible to preserve the statutory bar erected by the National Labor Relations Act against inquiry by the Board into the internal affairs of a union if the Board is to determine the reasonableness of a fine or the regularity of its imposition. It of course does not matter whether the Board gives a union a clean bill of health or finds shortcomings. For it is

ıe fact of the inquiry, not what it turns up, that in-
olves the Board in the union's internal affairs. It is
ıst this involvement which the Act is designed to
void. To fail to give effect to this avoidance is to
isregard the line which the Act draws. It bears re-
ıembering, as Judge Learned Hand cautioned, that
the 'policy' of any law may inhere as much in its
mits as in its extent."[20] And the limit of this law bars
ıe Board from probing a union's internal affairs.

The extent to which the limit would be hopelessly
verstepped is evident from the factors which the Court
f Appeals marshals for the Board's consideration in
etermining the reasonableness of a fine (Pet. 29a):

> The reasonableness of a fine would necessarily have to be determined in light of the circumstances leading to its imposition. Such factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined, the detrimental effect of the strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, the availability of other less harsh union remedies, and many other similar considerations would clearly be relevant.

here is no possibility of probing these imponderables
thout searching scrutiny into the union's internal
fairs. But this is hardly all. For the probe cannot
op with assessing the size of the fine. There is no
incipled basis for not also evaluating any other claim

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[20] L. Hand, The Spirit of Liberty, 164 (Dilliard ed. Vintage
oks, New York, 1959).

of arbitrary imposition of a fine additional to its asserted excessiveness. Everything must be laundered if anything is to be.

Not only does the Court of Appeals thus put the Board wholesale into the business of overseeing union administration of internal discipline, but it jettisons the requirement of prior recourse to internal union remedies, for it directs the Board to inquire into the reasonableness of the fines despite the failure of the members to exhaust their intraunion avenues of redress (Pet. 23a, n. 27). In this case, many members did not appear for trial at all; others who appeared for trial and were fined took no internal appeal from the adverse decision (*supra*, p. 9). Accordingly, those who did not appear for trial disregarded the internal union procedure altogether. Those who did appear for trial but did not appeal forewent the internal appellate opportunity for reversal or favorable modification. In sum, therefore, the internal union procedure was disregarded at its trial stage by many and at its appellate stage by all.

To direct the Board nevertheless to review the reasonableness of the fine when the internal union procedure for consideration of the issue has been bypassed conflicts with the requirement that the available internal remedy be exhausted before relief is sought from other tribunals. Exhaustion furthers the independent interest in union self-government, encourages the self-correction of claimed wrongs, and avoids extraunion oversight without the benefit of full prior union scrutiny. *Hodgson* v. *Local Union 6799, Steelworkers*, 403 U.S. 333 (1971). ". . . [C]ourts and agencies will frustrate an important purpose of the 1959 legislation

if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function." Mr. Justice Harlan concurring in *N.L.R.B.* v. *Marine and Shipbuilding Workers,* 391 U.S. 418, 429 (1968). See also, *Falsetti* v. *Local 2026, United Mine Workers,* 400 Pa. 145, 161 A.2d 882 (1960).

The experience of the IAMAW shows that prior recourse to the internal union remedy is not ceremonial. We have reviewed the appeals taken from decisions of the IAMAW Local Lodges to the International President of the IAMAW for the two-year period beginning January 1, 1971. Forty-one appeals were taken. The International President affirmed the District Lodge in full in 22 cases, upholding seven not-guilty decisions, eleven guilty decisions, and four decisions not to prosecute the charges. The International President altered the District Lodge decision in 19 cases, reversing 11 guilty decisions, partly reversing and partly affirming two guilty decisions, suspending or moderating the penalty in four cases, increasing the penalty in one case, and ordering a retrial in one case.[21] Internal ap-

[21] In one case presently in litigation, in which the events preceded the study period, the International President reduced the fines of each of 11 strikebreakers from $1,000 to $100. *Production Electronic & Aero-Dynamic Lodge No. 1327, IAMAW,* 192 NLRB 1098, 78 LRRM 1099 (1971), pending on petition for enforcement before the Court of Appeals for the Ninth Circuit, *N.L.R.B.* v. *Production Electronic & Aero-Dynamic Lodge No. 1327, IAMAW,* No. 71-3068. During the study period, 15 appeals pertained to picketing or strikebreaking activity. The International President upheld nine guilty decisions, reversed two guilty decisions, partly reversed and partly affirmed three guilty decisions, and suspended the penalty in one case.

pellate review is thus obviously meaningful. Furthermore, a written opinion is rendered in each case explaining the basis for the decision on appeal, so that any extraunion review is advantaged by an explicit statement of the reasons for decision.

Prior recourse to the internal union remedy as a precondition to external review is therefore critical both to union self-government and to informed extraunion oversight. As a Maryland court held in sustaining a judgment enforcing a $500 fine against a member for strikebreaking, "a union member must exhaust the remedies open to him under the union rules before he can seek aid from the courts unless the union procedure is procedurally or substantively inadequate, fraudulent, or otherwise arbitrary and illegal"; therefore a member who foregoes "adequate" union trial and appellate procedures and chooses instead "not to seek to protect . . . [his] rights within the Union procedures . . . cannot be heard in court to say that they are not effective to impose coercive discipline against him." *Walsh* v. *Communications Workers of America, Local 2336*, 259 Md. 608, 612, 613, 271 A.2d 148, 150, 151 (Md. Ct. of App. 1970).

Accordingly, if the Board is to be required to oversee union administration of internal discipline, the exhaustion rule confronts the Board with two equally indefensible alternatives. The Board must either repudiate the principle of exhaustion of internal union remedies, and thus destroy a bulwark of union self-government. Or the Board must consider the sufficiency of such reasons as may be urged to excuse the failure to exhaust, and thus deeply involve itself in probing the

interstices of a union's internal affairs.[22] Either way the Board would be heavily in the business of regulating union self-government, a field from which Congress excluded it.

To escape the horns of this dilemma, the Court of Appeals flatly rejects the exhaustion requirement as a matter of indifferent concern, holding that the "imposition of such a requirement in this case concerning the reasonableness issue would not . . . best serve the interests of justice or further the objectives of the N.L.R.A. The issue here involves public policy and thus transcends the pure internal affairs of the Union" (Pet. 23a, n. 27). But the requirement of exhaustion cannot be finessed by saying that the substantive issue "involves public policy." The doctrine of exhaustion has its source in a rule of judicial administration long and firmly established not only for internal union remedies but also in statutory administrative proceedings[23] and for contractual adjustment procedures created by collective bargaining agreements.[24] It is part of "public policy" to require prior recourse to the tribunals having initial responsibility for decision before per-

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[22] The deep incursion into a union's internal affairs requisite to deciding whether or not exhaustion should be required is illustrated by the discussion in Summers, *The Law of Union Discipline: What The Courts Do In Fact*, 70 Yale L.J. 175, 207-212 (1960); Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1086-1092 (1951).

[23] *E.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

[24] *E.g.*, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1955); *Neal* v. *System Board of Adjustment*, 348 F.2d 722, 727 (1965) (opinion of Justice Blackmun).

mitting intercession by other ultimate reviewing bodies. The interest in orderly procedure which the exhaustion requirement serves is as exigent whether the substantive issue to be adjudicated is said to be "public," "private," or an admixture. There is nothing in the nature of a "reasonableness" issue which suggests that it is not suited to prior union scrutiny through the union trial and appellate procedures. On the contrary, the issue especially implicates close attention to particularities, which resist useful generalization, and would therefore uniquely benefit from full initial union examination.

Nor does this Court's decision in *N.L.R.B.* v. *Marine and Shipbuilding Workers,* 391 U.S. 418 (1968), invoked by the Court of Appeals, support its view (Pet. 23a, n. 27). *Marine Workers* holds that exhaustion is not required where the rule for whose violation discipline is imposed is itself invalid and the union procedure "plainly inadequate" (*id.* at 425). A rule against strikebreaking is of course valid, and the reasonableness of a fine for its breach is a question within the heartland of union self-government. Prior recourse to its procedures is hence obligatory if those procedures are adequate and fair. As Justice Blackmun has explained, with "internal remedies so definitely available, resort to them, or an adequate reason for failure so to do, is a prerequisite to equitable relief against the union or its officers . . . ." *Neal* v. *System Board of Adjustment,* 348 F.2d 722, 726 (C.A. 8, 1965).

To be sure, administration of the exhaustion rule would entwine the Board within the interstices of a union's internal affairs. And that makes the point precisely. For the import of this factor serves, not to justify jettisoning the exhaustion requirement, but to confirm that review of union discipline is not within

the Board's bailiwick. When the minimum cost of the Board's entry into the field is rejection of exhaustion and resulting major dislocation of accepted law pertinent to review of union discipline, the clear teaching is that working in this field is not the business of the Board.

F. The Board's Interpretation, Contemporaneously Adopted and Uniformly Followed, Is Entitled to Great Weight

Section 8(b)(1)(A) and its proviso were enacted in 1947. The Board's consistent interpretation of the proviso, from the beginning to the present, is that it places the administration of union discipline to enforce a valid union rule outside its regulatory authority. This was the design of the proviso in preserving "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." ". . . [B]y including this *proviso* Congress unmistakably intended to, and did, remove the application of a union's membership rules to its members from the proscriptions of Section 8(b)(1)(A), irrespective of any ulterior reasons motivating the union's application of such rules or the direct effect thereof on particular employees."[25] The Board has "not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a

[25] *International Typographical Union*, 86 NLRB 951, 957 (1949), affirmed, 193 F.2d 782, 800-801 (C.A. 7, 1951). See also, *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954); *Foundation Co.*, 120 NLRB 1453, 1466 (1958); *Allen-Bradley Co.*, 127 NLRB 44, 47 (1960), enforcement denied, 286 F.2d 442, 446 (C.A. 7, 1961), but court's opinion not acquiesced in by Board, *Scofield*, 145 NLRB 1097, 1102 (1964), and Board's decision affirmed, 394 U.S. 423 (1969); *Local 248, United Automobile Workers*, 149 NLRB 67 (1964), affirmed, 388 U.S. 175 (1967); *Independent Stave Co.*, 175 NLRB 156, 159 (1969).

union may impose on a member so long as the penalty does not impair the member's status as an employee."[26]

It is of course settled that an agency's consistent construction of its own statute, especially a contemporaneous construction, "is entitled to great deference." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); see also, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). And in this case that "prior long-standing and consistent administrative practice must be deemed to have received congressional approval." *Fribourg Navigation Co.* v. *C.I.R.*, 383 U.S. 272, 283 (1966). For the Board's "interpretation of § 8(b)(1)(A) . . . was reinforced by the Landrum-Griffin Act of 1959 which, although it dealt with the internal affairs of unions, including the procedures for imposing fines or expulsion, did not purport to overturn or modify the Board's interpretation of § 8(b)(1)." *Scofield*, 394 U.S. at 429. An administrative construction with these credentials should lead the Court to defer to the Board's interpretation.[27]

G. Analysis of the Reasons Identified by the Court of Appeals To Support Its Conclusion Justified by It as "Intuitively Obvious."

The Court of Appeals supports its conclusion on the ground that its correctness is "intuitively obvious . . ." (Pet. 24a). We turn to consider the factors which it identifies to fortify its intuition.

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[26] *Scofield*, 145 NLRB 1097, 1104 (1964), affirmed 394 U.S. 423 (1969).

[27] See also, *Trafficante* v. *Metropolitan Life Ins. Co.*, 41 U.S.L.W. 4071, 4073 (S.Ct. 1972); *United States* v. *City of Chicago*, 400 U.S. 8, 10 (1970); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 417-418 (1945).

1. *Precedent:* The Court of Appeals states that the Board's conclusion that it is without power "is based upon a clear misconception of the law and the Supreme Court's relevant decisions" (Pet. 23a). For its view of the right reading of this Court's decisions it refers to the Court's advertence to a "reasonable fine" in *Allis-Chalmers,* 388 U.S. at 183, and in *Scofield,* 394 U.S. at 428, 436 (Pet. 23a-25a). But the Court of Appeals quite mistakes the meaning of the statements alluding to a "reasonable fine." These statements are all referable to the conclusion in both *Allis-Chalmers* and *Scofield* that the *body* of Section 8(b)(1)(A) had not been violated and for that reason there was no need to rely on the *proviso.* It is the *proviso* which bars the Board from inquiry into the reasonableness of a union fine, and neither *Allis-Chalmers* nor *Scofield* addresses the interpretation of the *proviso* as a limitation upon the Board's power.

Furthermore, as Judge Browning observed in dissent in *Morton Salt Co.* v. *N.L.R.B.,* 82 LRRM 2066, 2071-72 (C.A. 9, 1972), "[t]here are other reasons for the Supreme Court's reference to 'reasonable' fines. The most obvious is that there was no contention that the fines in *Scofield* were unreasonable. *See* 394 U.S. at 430. The same is true of *Allis-Chalmers. See* 388 U.S. at 192-193 n. 30. If the adjective was used with some purpose in addition to that of accurately stating the facts of the cases, it 'seems directed to enforcing courts, encouraging those courts to make an independent determination of the reasonableness of the fine in each case presented, in the same fashion as courts limit other union discipline which imposes a severe hardship.' "

In short, at most, all that can be drawn from the Court's adjectival advertence to a "reasonable" fine is that the Court, not presented with the question, reserved but did not resolve it. We do not think it is the fashion of this Court to decide an important issue by an equivocal aside.

2. *Logic:* The Court of Appeals reasons from the premise that section 8(b)(1)(A) of the Act does not bar a reasonable fine to the conclusion that it therefore impliedly prohibits "an unreasonably large fine . . ." (Pet. 25a). But the conclusion is not logically embraced by the premise. A rule against strikebreaking is valid. The minimum measure of a reasonable fine for violating a valid rule is that it may be sizable enough to compel complete compliance with the rule. There is no point to a fine that does not by its amount enforce full obedience to the rule. Entire restraint of strikebreaking thus inheres in the rule and its enforcement.

This means that a reasonable fine will operate as a total restraint against strikebreaking. That is its object. Accordingly, an "unreasonable" fine does not add to the restraint against strikebreaking that a "reasonable" fine itself exerts. The restraint already designedly exists. It is not, therefore, the fact of restraint that renders a fine unreasonable, but inequity for other reasons in the internal ordering of the relationship of the member to his union. Thus a fine may be too high because disproportionate to the character of the offense, the financial resources of the offender, the circumstances of the offense, the knowing or unwitting intent with which it was committed, adherence to or departure from past practice in the amount levied,

and other factors relevant to evaluating the appropriateness of the punishment. These factors are not unique to enforcement of a rule against strikebreaking but relate equally to assessing the acceptability of any discipline imposed for violation of any valid rule. It is, consequently, the reasonableness of union administration of internal discipline which is at issue. This issue is not the business of the Board and does not become its business just because the discipline happens to take the form of a court-collectible fine imposed for strikebreaking. Accordingly, as Judge Browning observed in dissent in *Morton Salt Co.* v. *N.L.R.B.*, 82 LRRM 2066, 2072-73 (C.A. 9, 1972):

> The necessary effect of a fine in any amount is, literally, "to restrain or coerce" a member to adhere to the union's anti-strikebreaking rule. Nevertheless, the *Allis-Chalmers* court held that as used in section 8(b)(1)(A) these words simply were not intended to include a prohibition against the imposition of fines on union members who violate such a rule.
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> * * *
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> A fine may be unreasonably high, but not because of its impact upon a union member's right to cross a picket line in violation of a union rule, or on the supposition that it affects his employment status. In a collection proceeding, a state court may find equitable reasons for refusing to enforce unnecessarily severe punishment (*NLRB* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 193 n.32), but collection proceedings are not for the Board.
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> Since under Allis-Chalmers a fine which restrains a union member from working during a

strike is not an unfair labor practice, and since no other tenable theory of an unfair labor practice has been advanced in this case, the Board correctly ruled that it had no jurisdiction to consider the reasonableness of the fines.

3. *Uniformity:* While disclaiming that it is deciding that "union action for enforcement of disciplinary penalties is pre-empted by federal labor law" (Pet. 25a, n. 30), the Court of Appeals nevertheless states that "[t]here is something to be said for having the reasonableness of fines determined by standards that are as nearly uniform as national standards promulgated by the N.L.R.B. can be" (Pet. 27a). The apparent hope of the Court of Appeals is that, while state courts need not follow the Board's lead in exercising their independent adjudicatory authority, they may be persuaded to adopt whatever standard the Board may devise. This hope may or may not prove well-founded, but it would not result in real uniformity even if it were. As the factors marshalled by the Court of Appeals show (*supra*, p. 41), any standard that can be formulated must take into account so many variables that it must almost necessarily emerge as an empty generality rather than as a meaningful guide. Furthermore, even were the Board able to fashion a genuine standard that state courts would be inclined to follow, a uniform substantive rule cannot itself assure evenhandedness in actual application. For a " 'multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.' " *Amalgamated Association* v. *Lockridge*, 403 U.S. 274, 287 (1971). In this context to invoke uniformity is to pursue an illusion.

In its opposition to certiorari, Boeing drives the argument of uniformity to its logical conclusion by suggesting not only that the Board is empowered to decide the reasonableness of a fine, but that it is to exercise this authority to the exclusion of state power, invoking the doctrine of preemption to oust the states from this field (Br. pp. 12-15). But the logic of the argument serves only to expose the fallacy of the premise on which it rests. For, as we have seen (*supra*, pp. 26-40), there is no room for this version of the allocation of function—ouster of the States and centrality in the Board—within the regime that Congress has fashioned to oversee union administration of internal discipline.

". . . [T]he labor relations pre-emption doctrine finds its basic justification in the presumed intent of Congress" (*Amalgamated Association* v. *Lockridge*, 403 U.S. 274, 302 (1971); " '[t]he purpose of Congress is the ultimate touchstone.' " *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 239 (1971). Congress did not put the Board in the business of overseeing the administration of internal union discipline. Thus, in the adjudication of claims arising under the LMRDA presenting federal questions of the "fairness of an internal union disciplinary proceeding", this Court has held that Congress did not place these claims "within the exclusive competence of the National Labor Relations Board", but entrusted them instead to the keeping of the federal district courts as a judicial function. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. at 237-241. And in the LMRDA, in demarcating an area of federal judicial control over internal union discipline, Congress was explicit in its preservation of state power

within this field. Thus, in section 103 of Title I of LMRDA, Congress provided that (73 Stat. 523, 29 U.S.C. § 413):

> Nothing contained in this title shall limit the rights and remedies of any member of a labor organization *under any State* or Federal *law* or before any court or other tribunal, or under the constitution and bylaws of any labor organization. [Emphasis supplied.]

Similarly, in section 603(a) of the LMRDA, Congress provided that (73 Stat. 540, 29 U.S.C. § 523(a)):

> Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or *under the laws of any State*, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law *or law of any State*. [Emphasis supplied.]

Accordingly, in the field of internal union discipline, Congress has carefully and expressly maintained state power. It has avoided conflict by excluding the Board from this field, not vice versa. In short, " 'internal union matters' . . . [is] a subject the National Labor Relations Act leaves principally to other processes of law." *Amalgamated Association* v. *Lockridge*, 403 U.S. 274, 296 (1971). To say that the Board preempts this field is to turn governmental regulation of this subject upside-down. *Parish* v. *Legion*, 450 F.2d 821, 828-829 (C.A. 9, 1971); *Communications Workers of*

America, AFL-CIO, Local 9206 v. *Maloney*, 259 Or. 470, 486 P. 2d 1275 (1971).[28]

4. *Litigation expense:* The Court of Appeals suggests that it is less expensive for the employee to resolve the reasonableness-of-fine issue in an NLRB than a court proceeding, and the NLRB processes should therefore be available (Pet. 27a.). This is sheer makeweight. Power was withheld from the Board to adjudicate this issue because Congress concluded it was not the fit business of the Board. It does not become the Board's business because it would be less expensive for a particular litigant to invoke the Board's processes. Furthermore, nothing can save the employee the expense of a judicial proceeding. If the union sues to collect the fine the member must either incur the expense of a defense or default. He has no other alternative. For all of us "the expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration* v. *Public Service Commission*, 304 U.S. 209, 222 (1938). Finally, it is altogether a matter of legislative judgment whether the expense of litigation should be borne by the Government by entrusting an agency with the laboring oar, or should be placed on the losing litigant,

[28] A simple observation exposes the utter fallacy of Boeing's position. If the issue of the reasonableness of a union fine were preempted by the Board, no state court would have jurisdiction to entertain a union's suit to collect a fine, for it would have no power to adjudicate an element essential to establishment of the claim. The Board itself lacks any authority to award the union a money judgment for the amount of the fine. The result would be that no tribunal would be empowered to entertain the union's action to collect a fine. This is an impossibility. *Communication Workers of America, AFL-CIO, Local 9206* v. *Maloney*, 259 Or. 470, 486 P.2d 1275 (1971).

or should lie where it falls regardless of the outcome. "... [E]conomic accessibility may be [a] valid policy reason . . . for a legislative grant of jurisdiction to the Board, but . . . [it] cannot furnish a basis for jurisdiction in the absence of such a grant." Judge Browning dissenting in *Morton Salt Co.* v. *N.L.R.B.*, 82 LRRM 2066, 2073, n. 3 (C.A. 9, 1972).

Accordingly, the reasons mustered by the Court of Appeals do not justify its conclusion. It upsets the allocation to the courts of the function of overseeing union administration of internal discipline, injects the Board into a field foreign to its statutory concern, destroys the exhaustion requirement in an area where its operation is especially fit, and discards a long-settled and consistent administrative construction. The nub of the matter on analysis remains rather as the Board put it in its governing decision in *David O'Reilly* (Pet. 57a-58a):

> The Board has long recognized that, as a practical matter, "virtually all union rules affect a member's employment relationship." However, given the legitimacy of the rule, the only question of relevance to the agency enforcing this Act is "whether, in enforcing the rule, the Union goes outside the area of union-membership relationship and enters the area of employee-employer relationship." The Union has not done so here, nor has it sought to vindicate a policy in conflict with the National Labor Relations Act, and the Act does not authorize this Board to evaluate the fairness of union discipline meted out to protect a legitimate union interest.

II. GIVEN A UNION CONSTITUTION WHICH PROHIBITS A MEMBER FROM "ACCEPTING EMPLOYMENT IN ANY CAPACITY IN AN ESTABLISHMENT WHERE A STRIKE . . . EXISTS", A MEMBER'S MID-STRIKE RESIGNATION FROM HIS UNION DOES NOT FREE HIM FROM HIS EXISTING UNION OBLIGATION TO REFRAIN FROM STRIKE-BREAKING IN THAT STRIKE FOR ITS DURATION.

In *N.L.R.B.* v. *Granite State Joint Board*, October Term 1972, No. 71-711, the Court held that, absent a limitation in the union constitution, a member is free to resign from his union and engage in strike-breaking subsequent to his resignation without incurring the liability of a court-collectible fine imposed by the union to discipline him for his postresignation return to work. The Court did not consider an initial membership vote to strike, or a later membership resolution subjecting any member aiding or abetting the employer during the strike to a $2,000 fine, to suffice as a restriction on resignation. The Court stated that "[n]either the contract nor the Union's constitution or bylaws contained any provision defining or limiting the circumstances under which a member could resign" (sl. op. p. 1). It observed that "[w]e have here no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union" (sl. op. p. 3). It cautioned that "[w]e do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign" (sl. op. p. 4).

The question reserved in *Granite State* is presented in this case. The union constitution here explicitly prohibits a member from "[a]ccepting employment in any capacity in an establishment where a strike . . .

exists . . ." (*supra*, p. 5). The members have thus by specific commitment mutually promised one another to refrain from strikebreaking and have incorporated this promise in the bond which orders their relationship. Through their internal tribunals they have consistently and reasonably interpreted their promise as a commitment which binds a member notwithstanding his resignation to abstain from strikebreaking for the future duration of an existing strike.[29]

At the convention of the IAMAW in September 1972 the members have made this interpretation completely express. The prohibition against accepting employment in an establishment where a strike exists has in convention been amended, effective January 1, 1973, to provide that this ban survives resignation and endures for the future duration of an existing strike. The amendment to the union constitution reads that:

> Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

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[29] *E.g.*, *IAMAW* v. *N.L.R.B.*, 456 F.2d 1214 (C.A. 5, 1972); *Production Electronic & Aero-Dynamic Lodge No. 1327, IAMAW, AFL-CIO*, 192 NLRB No. 145, 78 LRRM 1098 (1971), pending on petition for enforcement, *sub. nom.*, *N.L.R.B.* v. *Production Electronic & Aero-Dynamic Lodge No. 1327, IAMAW, AFL-CIO*, C.A. 9, No. 71-3068; *IAMAW, AFL-CIO, and Local Lodge 598 (Union Carbide Corp.)*, 196 NLRB No. 114, 80 LRRM 1079 (1972); *District Lodge No. 99, IAMAW, AFL-CIO (General Electric Co.)*, 194 NLRB No. 163, 79 LRRM 1208 (1972).

This amendment simply confirms the meaning which inheres in the preexisting promise to refrain from strikebreaking. While the amendment postdated the events in this case, it focuses the inquiry. We are required first to ask whether the preexisting commitment is fairly interpreted to bar postresignation strikebreaking, as is now explicitly provided. If it is, we are required next to ask whether the commitment, formerly implied and presently express, is lawful. Accordingly, we shall show (1) that a union constitution which bans accepting employment in an establishment where a strike exists, faithfully interpreted in keeping with its just purport, bars treating resignation in the course of a strike as a license to engage in strikebreaking for the future duration of the existing strike, and (2) that "statutory policy" does not militate against this implication but is instead quite in harmony with it.

A. Joining the Issue.

The Board holds that, in the absence of an explicit contrary restriction upon the effect of resignation, a member's resignation from his union in the midst of a strike frees him from his union obligation to refrain from strikebreaking in that strike for its future duration. The premise of this conclusion is that the obligations assumed upon the acquisition of membership subsist only during the period of membership and therefore terminate forthwith upon resignation. At the heart of this premise is the Board's concept of the "membership relationship" established by "a contract-constitution" to which the individual "becomes a party" upon "joining the union" (Pet. 39a). In the Board's view the contract-constitution "becomes a nullity" upon resignation, and *ipso facto* the "mem-

ber's duty of fidelity to the union and the union's corresponding right to discipline for breach of that duty are extinguished" forthwith (Pet. 39a-40a). To fortify its view as to the meaning of a union constitution as a matter of contract law, the Board draws upon the "statutory policy to prevent coercion of employees for exercising Section 7 rights" safeguarded against union encroachment by section 8(b)(1)(A) of the Act (Pet. 41a-42a).

It is thus the Board's thesis that, absent an express contrary stipulation, resignation results in blanket nullification of the applicability of the union constitution to govern the former member's future conduct for any purpose, and requires absolute and abrupt extinction of all existing obligations in total disregard of any circumstances. It is this thesis which we contest as fundamentally fallacious. Treating the union constitution as a contract, it is elementary that "the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise,"[30] and that ascertainment of the existence, meaning and consequences of a promise depends as much upon implications of fact and operation of law as it does upon express terms.[31] Thus, although wanting in explicitness, a promise may nevertheless be "fairly . . . implied", for "the whole writing may be 'instinct with an obligation', imperfectly expressed."[32] And so, in

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[30] 1 Corbin, Contracts, 2 (1950).

[31] 3 Corbin, Contracts, 276-355 (1950).

[32] Cardozo, J., in *Wood* v. *Duff-Gordon*, 222 N.Y. 88, 90, 118 N.E. 214 (1917). See also, *Marrinan Medical Supply* v. *Ft. Dodge Serum Co.*, 47 F.2d 458, 463-465 (C.A. 8, 1931); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 104-106 (1962).

"construing contracts, courts must look not only to the specific language employed, but also to the subject matter contracted about, the relationship of the parties, the circumstances surrounding the transaction, or in other words place themselves in the same position the parties occupied when the contract was entered into, and view the terms and intent of the agreement in the same light in which the parties did when the same was formulated and accepted." [33]

This Court just last term gave forthright expression to the indispensability of implication in determining the existence and meaning of a contract. ". . . [T]he law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' 3 Corbin on Contracts, §§ 561-672A. Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' *Id.*, at § 562. And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' *Ibid.*" *Perry* v. *Sinderman*, 408 U.S. 593, 601-602 (1972).

Given this orientation the question is whether the explicit union constitutional ban of strikebreaking is justly interpreted to mean, where it is silent upon the subject, that a mid-strike resignation frees the member forthwith from his existing union obligation to refrain from breaking the very strike which he was duty-bound to observe when it began. In "every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper

[33] *Miller* v. *Miller*, 134 F.2d 583, 588 (C.A. 10, 1943).

purposes. . . ."[34] This duty of loyal support finds its cardinal expression in the obligation to refrain from strikebreaking. Every member depends on every other to withhold his labor from the struck employer in order to make the strike effective. The least that each member is entitled to expect of the other is that all who are pledged to the common cause at the beginning of the struggle will fulfill their obligation to carry through for its duration. Accordingly, a mid-strike resignation from a union, however efficacious it may be to sever other membership obligations, should not as a matter of the fair interpretation of the relationship be given the effect of relieving the resigner instanter of his duty to refrain from strikebreaking at the very moment when its observance counts most.

The issue that is thus joined is the interpretation of the postresignation reach of a specific ban of strikebreaking, and the influence of "statutory policy" in making and validating the interpretation.

B. This Court's Validation in Allis-Chalmers of the Imposition of a Court-Collectible Union Fine as a Discipline Against Strikebreaking.

We begin with this Court's decision in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) The Court answered "no" to the question "whether a union which threatened and imposed fines, and brought suit for their collection, against members who crossed the union's picket line and went to work during an authorized strike against their employer, committed the unfair labor practice under § 8(b)(1)(A) of the National Labor Relations Act of engaging in conduct 'to restrain or coerce' employees in the exercise of their right

[34] *Polin* v. *Kaplan*, 257 N.Y. 277, 177 N.E. 833, 834 (1931).

guaranteed by § 7 to 'refrain from' concerted activities." 388 U.S. at 176.[35] Underpinning this holding was recognition that strikebreaking was fundamentally offensive to union solidarity essential to effective economic action (*id.* at 180, 181-182):

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by a majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. . . .
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> Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ." Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.

The "history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from

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[35] See also, *Rocket Freight Lines Co.* v. *N.L.R.B.*, 427 F.2d 202, 205-206 (C.A. 10, 1970); *U.O.P. Norplex Division* v. *N.L.R.B.*, 445 F.2d 155 (C.A. 7, 1971).

concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather, the contrary inference is more justified in the light of the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status" (*id.* at 195).

C. A Union Constitution Prohibiting Strikebreaking, Although Silent on the Subject of the Effect of Resignation, Cannot Reasonably Be Interpreted To Authorize Strikebreaking Subsequent to a Mid-Strike Resignation Where the Individual Was a Member of the Union at the Inception of the Strike, for the Implied Obligation of Loyalty Binds Him Notwithstanding Resignation To Refrain from Strikebreaking for the Duration of the Existing Strike.

Given the constitutional duty confirmed by *Allis-Chalmers* to refrain from strikebreaking, which every member assumes upon acquisition of membership, the question is whether resignation in the midst of a strike forthwith terminates that duty with respect to that very strike. The answer turns on whether the union constitution contemplates that a mid-strike resignation authorizes instant conversion of the duty to refrain from strikebreaking into a freedom to break the existing strike. It is to the last degree unimaginable that the union constitution is fairly capable of that interpretation.

The constitution is the union's charter of government. It orders the relationship of the union and its members to preserve and promote organizational effectiveness. A prominent organizational need is the ability

of the union to prosecute a strike. It is impossible to suppose, from the viewpoint of either the union as an institution or of any member as part of that institution, that the constitution allows desertion from the ranks in the midst of a strike. ". . . [N]egotiations are carried on with the prospect of an immediate or possible break of diplomatic relations and a resort to force. If the break comes the union goes to war and the need for discipline is obvious. The employer is the enemy; giving him any aid or comfort is treason. To supply him with labor is to furnish him the weapon with which the battle is fought and is clear treason." [36]

It is plain that the union constitution as the governing instrument cannot be reasonably interpreted to mean that a mid-strike resignation has the expected effect of authorizing the defector to break the existing strike. On the contrary, "derived from implied covenants of good faith and fair dealings" which inhere in every contract,[37] the least that the constitution contemplates is that the obligation to refrain from strike-breaking, undertaken before the strike and activated by it, shall endure for the duration of the strike.

The obvious escapes understanding only because the constitution is silent upon the effect of a mid-strike resignation. But silence presents the interpretative question; it does not decide it. Silence simply puts the trier to the task of extrapolating the probable meaning of the constitution based on the subject matter, rela-

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[36] Summers, *Disciplinary Powers of Unions*, 3 Ind. & Lab. Rel. Rev. 483, 489 (1950).

[37] *Local 1912, I.A.M.* v. *United States Potash Co.*, 270 F.2d 496, 498 (C.A. 10, 1959), cert denied, 363 U.S. 845 (1959).

tionship, and interests to be served in the light of the circumstances from which the problem emerges.

Fleshing out a contract so as to supply the unexpressed but fair and reasonable rule for the intentionally or inadvertently omitted situation is a commonplace in the interpretation of a collective bargaining agreement.[38] This interpretative function is no less a necessity, if perhaps less forthrightly recognized, in the interpretation of other contracts.[39] "Parties to a contract may, either intentionally or by oversight, omit certain terms or leave them to be determined in the future. When litigation ensues, the court, if it is not to frustrate the parties' dominant intent to make a contract, must often fill the gaps 'if it is possible to reach a fair and just result.' Although courts declare that they will not make a contract for the parties, they must frequently complete the contract by filling in the omitted terms. Such completion is, in a very real sense, an act of creation."[40]

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[38] *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-582 (1960). See also, *Perry* v. *Sinderman*, 408 U.S. 593, 602 (1972).

[39] Summers, *Collective Agreements and the Law of Contract*, 78 Yale L.J. 525, 529-530 (1969). "The notion that ordinary commercial contracts spell out all their obligations is a silly canard." Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 31 (1958).

[40] Summers, *supra*, at 551. ". . . [A] sound judicial tradition stresses concern for context, purposes, needs and consequences in resolving the ambiguities and the gaps that exist in all agreements. See, Llewellyn, *What Price Contract? An Essay in Perspective*, 40 Yale L.J. 704, 746 n. 86 (1931); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 475-476 . . . (1960) (dissenting opinion)." Meltzer, *Labor Law, Cases, Materials, and Problems*, 746 (1970).

This approach is indispensable to the realistic reading of a union constitution. "Membership in a union contemplates a continuing relationship with changing obligations as the union legislates in a monthly meeting or in annual conventions. It creates a complex cluster of rights and duties expressed in a constitution. In short, membership is a special relationship." [41] We are required to ask whether that special relationship has during its pre-strike subsistence induced reliance on and created expectations of unity for the strike's duration so that the duty of loyalty inhering in the relationship should not in fairness be abruptly severed by a resignation in the midst of a strike. In considering that question there is no more room for dogmatic assertion that resignation must forthwith willy-nilly terminate all obligations flowing from the membership relationship than there would be for a cognate claim that divorce must automatically end all obligations flowing from the marriage contract.

The perspective which the Board lacks is provided by looking to what courts do when dealing with the termination of a contractual relationship. Thus, "where an exclusive franchise dealer under an implied contract, terminable on notice, has at the instance of a manufacturer or supplier invested his resources and credit in establishment of a costly distribution facility for the supplier's product, and the supplier thereafter unreasonably terminates the contract and dealership without giving the dealer an opportunity to recoup his investment, a claim may be stated." [42] So too, a "provi-

[41] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1056 (1951).

[42] *Clausen & Sons* v. *Theo. Hamm Brewing Co.*, 395 F.2d 388, 391 (C.A. 8, 1968). See also, Gellhorn, *Limitations on Contract Termination Rights-Franchise Cancellations*, 1967 Duke L.J. 465.

sion which would limit the termination rights of a party may be implied into the bargain under some circumstances." [43] Similarly, an agreement of indeterminate duration is terminable, but only after a reasonable lapse of time and upon reasonable notice.[44] Likewise, the liberty to quit employment is subject to the disability that in future employment the employee may not exploit the use of confidential information acquired in the former employment to the disadvantage of the former employer.[45] In like manner, resignation of a carrier from a shipping conference does not bar the conference from trying the carrier for preresignation infractions in accordance with *changed* procedures instituted *subsequent* to resignation.[46] Finally, just last term, in considering the status of a teacher whose employment was not protected by "an explicit tenure provision" and who had not been rehired for the next school year, this Court observed that "there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure" despite the absence of an "explicit tenure system . . . ." [47]

In all these situations the courts implied, or asserted the power to imply, just and reasonable conditions

[43] *Clausen & Sons* v. *Theo. Hamm Brewing Co.*, 395 F.2d 388, 391, n. 3 (C.A. 8, 1968).

[44] *Miller* v. *Miller*, 134 F.2d 583, 588-589 (C.A. 10, 1943); *Boeing Airplane Co.* v. *N.L.R.B.*, 85 U.S. App. D.C. 116, 174 F.2d 988, 991 (1949).

[45] *N.L.R.B.* v. *I.L.G.W.U.*, 274 F.2d 376 (C.A. 3, 1960); *Junker* v. *Plummer*, 320 Mass. 76, 67 N.E.2d 667 (1946).

[46] *Pacific Coast European Conference* v. *F.M.C.*, 439 F.2d 514 (C.A.D.C., 1970).

[47] *Perry* v. *Sinderman*, 408 U.S. 593, 601-602 (1972).

upon the termination of the relationship which the agreement did not in terms express. No less is required in this case. Given the crucial expectation of utter membership solidarity during the critical period of a strike, and the rightful reliance of every member on every other to withhold his labor for the duration of the strike, a mid-strike resignation does not justly and reasonably comprehend lifting the existing duty to refrain from strikebreaking in the current controversy. The duty antedated the strike; observance of it was activated by the strike; performance should be required for the duration of the strike.

The Board in its decision is simply oblivious to these considerations; it neither recognizes nor confronts them. On its part, all that the Court of Appeals does is to assert that "it is generally recognized that courts will not usually imply offenses not specified in a union's constitution or bylaws" (Pet. 17a.). But this is a poor crutch. First, as the author whom the court cites to support its view makes clear, this stricture is limited to the innovation of a prescript in a situation where no rule at all exists; it does not apply to the interpretation of the scope of a rule which is in being.[48]

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[48] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1060-61 (1951):

> The prevailing rule that a member may not be punished for implied offenses cannot be justified on the ground that it protects a member from being disciplined for conduct which he believes to be proper. When the conduct is as flagrant as in some of the cases mentioned, the member is fully aware that he has acted improperly. Furthermore, the rule gives little practical protection to union members. It does not compel unions to define punishable offenses and to specify the penalties to be inflicted. Instead, the gaps are filled by such vague catchalls as "disloyalty," or "conduct detrimental to the best

Second, even as so limited, the author disapproves the approach, observing that it permits a member to escape discipline although he "is fully aware that he has acted improperly", "gives little practical protection to union members", and serves instead merely to relieve judges of the task of judging.[49] Third, this Court has discredited the approach as a matter of federal law, as it emphasized in *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971). This Court concluded, upon an examination of the legislative history of section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, that Congress deliberately declined to limit permissible discipline to violation of "a previously published, written union rule", or to miscreant conduct that "the union had proscribed prior to the union member having engaged in such activity" (*id.* at 242-244). The federal approach instead is to entrust unions with self-governing autonomy (*id.* at 242, 244-245):

> We find nothing in either the language or the legislative history of § 101(a)(5) that could justify . . . a substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members.

* * *

interest of the union." Union resolutions are made enforceable by including the offense, "disobedience to regulations, rules, mandates and decrees of the Local or International," and difficulties with penalties are eliminated by making all offenses punishable by fine, suspension, or expulsion.

The function of the rule against implied offenses is not nearly so much to protect the members, as it is to protect the courts. If the courts recognized implied obligations, they would have to determine what constituted a "serious offense."

[49] See preceding note.

> . . . § 101(a)(5) was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members. And if a union may discipline its members for offenses not proscribed by written rules at all, it is surely a futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope.

Lastly, the discredited approach invoked by the Court of Appeals is dubious even as an accurate rendition of the common law. "It would seem that where a member's act is clearly in derogation of an obvious group interest, either because the group's dedication to particular ideas or goals is clear or because the member's act is especially hostile to more general group interests, the association could properly expel under a very vaguely worded rule, or indeed without any rule." Note, *Developments in the Law, Judicial Control of Actions of Private Associations,* 76 Harv. L. Rev. 985, 1018 (1963).

In short, if a union is to be faulted for construing its prohibition against strikebreaking to apply to a mid-strike resigner for the duration of the existing strike, it should be on a better basis than the invocation of an interpretative crutch which either refrains from exercising judgment or conceals the basis for it. Federal law is better served by candid confrontation of a problem than by seeking refuge in rote.

D. The Rule That, Where a Union Constitution Is Silent on the Subject of Resignation, a Member Is at Liberty To Resign at Will, Does Not Support the View That the Mid-Strike Resigner Is Free To Engage in Strikebreaking in the Existing Strike.

To support its view that a mid-strike resigner is free to engage in strikebreaking in the existing strike subsequent to his resignation, the Board apparently

invokes the rule that, where the union constitution is silent upon the subject, members are at liberty to resign at will (Pet. 40a and n. 11). But invocation of the rule to support strikebreaking is quite inapt. For the situation in which that rule has been applied is utterly different from the present situation, and regard for the difference bars application of the rule to sanction strikebreaking.

In all situations in which the Board has applied the rule, the question has been whether under a union security agreement known as maintenance of membership, by the terms of which a nonmember need not join the union but an existing member must retain his membership in the union, membership is required on the part of a person who had resigned from the union before the effective date of the agreement.[50] To that question the Board has answered that, as the union constitution did not limit the time or manner of resignation, a person ceased to be a member on resignation and therefore the agreement did not require membership of that person because he was a nonmember when it became effective.

Accordingly, all that the rule apparently invoked by the Board stands for is that, in the application of a maintenance of membership agreement, a person becomes a nonmember on resignation in the absence of a contrary specification in the union constitution. This

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[50] *Aeronautical Industrial District Lodge 751*, 173 NLRB 450, 452 (1968); *Local 340, International Brotherhood of Operative Potters*, 175 NLRB 756 (1969); *Local Union No 621, United Rubber Workers*, 167 NLRB 610 (1967); *New Jersey Bell Telephone Co.*, 106 NLRB 1322, 1324 (1953), enforced *sub nom. Communication Workers of America* v. *N.L.R.B.*, 215 F.2d 835, 838 (C.A. 2, 1954).

rule means that a member who resigns during a strike is not obligated to join a union under the terms of a maintenance of membership agreement entered into at the end of the strike because he had become a nonmember before the effective date of the agreement. But it means no more.

Considered in the context of its application, therefore, neither the rule nor any rationale supporting it persuasively relates to the question this case presents, namely, whether a mid-strike resignation frees the erstwhile member to engage in strikebreaking in an existing strike. It is one thing to say that a person becomes a nonmember on resignation so that an ensuing maintenance of membership agreement is not applicable to him. Or that a person becomes a nonmember on resignation so that he is no longer under a financial obligation to pay future dues and assessments to the union. It is quite another thing, however, to say that liberty to engage in strikebreaking in the current controversy is the reasonable and expected consequence of a mid-strike resignation. Only an either-or mentality, requiring that things must be all one or all another, can fail to consider whether the same act may not entail a diversity of consequences. Moderate interpretative sophistication encounters no strain in finding that a particular status may have different attributes for different purposes.[51] Accordingly, to say that a mid-strike resignation renders a subsequent maintenance of membership agreement inapplicable to the resigner is not to begin to say that it frees the resigner to engage in strikebreaking in the existing strike.

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[51] *E.g.*, *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 190-193 (1941); *District of Columbia* v. *Carter*, 41 U.S.L.W. 4127, 4128-29 (S. Ct. Jan. 10, 1973); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950).

E. The Board's Mistaken Reliance on Expressions in Opinions of This Court Said To Suggest the View That Instant Freedom To Engage in Strikebreaking Is the Necessary Consequence of a Mid-Strike Resignation.

The Board apparently takes the position that certain expressions in opinions of this Court suggest the view that instant freedom to engage in strikebreaking is the necessary consequence of a mid-strike resignation. We turn to this claim.

1. The Board states that this Court in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196-197 (1967), "expressly refused to pass on the legality of the imposition of a fine upon 'limited members' of the union", from which the Board deduces that "in this reservation there was the implication that such a fine when levied against nonmembers constitutes a form of restraint and coercion proscribed by Section 8(b)(1)(A)" (Pet. 40a). The Board deduces too much from too little.

In *Allis-Chalmers*, under one type of union membership available in that case, "an employee is required only to become and remain 'a member of the Union . . . to the extent of paying his monthly dues . . .'" (388 U.S. at 196). As to that type of limited member—one who has undertaken only to pay dues to the union—this Court stated that whether the prohibition of Section 8(b)(1)(A) of the Act "would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view" (*id.* at 197).

To intimate no view as to whether a member whose obligation is limited to paying dues may be disciplined for strikebreaking is to intimate no reservation relevant to this case. A member whose union obligation is lim-

ited to paying dues is by negative implication a member who has not undertaken to fulfill any other obligation of membership; and it is surely arguable that a person who has not bound himself to refrain from strikebreaking cannot be fined for it. But we deal in this case, as the Court did in *Allis-Chalmers,* with persons who had full membership status (*id.* at 196-197),[52] and full membership embraces the obligation to refrain from strikebreaking (*id.* 181-182, *supra*, pp. 62-63). The question in this case, not presented in *Allis-Chalmers,* is whether a mid-strike resignation frees the full member to engage in strikebreaking in the existing strike. We have shown that it does not, and nothing in this Court's reservation concerning a limited member whose union obligation is confined to paying dues remotely suggests that it does.

2. In *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969), this Court held that Section 8(b)(1)(A) of the Act did not bar a union from fining a member for violating a valid union rule against exceeding a production ceiling. In reaching this conclusion the Court noted *inter alia* that the rule was enforced against "union members who are free to leave the union and escape the rule" (*id.* at 430). According to the Board, "[b]y observing that members could 'leave the union and escape the rule,' the Court seems to have envisaged the possibility that union members could, indeed, resign membership and avoid discipline" (Pet. 41a).

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[52] An evidentiary showing is required to establish that a member has less than full membership status. As the Court stated, "Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary." *Allis-Chalmers,* 388 U.S. at 196.

Since in *Scofield* the violation of the rule occurred during the term of a collective bargaining agreement, and since the union security clause in that agreement obligated an existing member to remain a member for the duration of the agreement (394 U.S. at 424, n.1), presumably the Court meant, when it said that "union members . . . are free to leave the union and escape the rule," that the member was free to renounce all union obligations except the payment of union dues. For a union security agreement, while it may do no more, may indubitably bind a person to pay union dues and initiation fees at the risk of losing his job if he does not. "Under § 8(a)(3) the extent of an employee's obligation under a union security agreement is 'expressly limited to the payment of initiation fees and monthly dues. . . . 'Membership' as a condition of employment is whittled down to its financial core.' " [53]

Accordingly, when the Court states that "union members . . . are free to leave the union and escape the rule," it envisages the member's exercise of his option during the contract term to convert from a full member (subject to all union obligations) to a limited member (subject only to the obligation to pay dues). But the option to convert to limited membership in *Scofield,* like the status of limited membership reserved in *Allis-Chalmers,* has nothing to do with the question that the instant case presents. Granted that a member may change from full to limited membership during the contract term, or may resign his membership altogether upon expiration of the contract, the question still remains of

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[53] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 197, n. 37 (1967), quoting from *N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963).

the fair effect to be given to a mid-strike resignation as it relates to the rule against strikebreaking. The member by resigning of course escapes the rule against strikebreaking in any *future* controversy, but does that mean that resignation frees him from observance of the rule at least for the duration of the existing strike? Surely that question has not been answered—it has not even been broached—by the statement in *Scofield* that a member could escape observance of the production ceiling rule by leaving the union. There is a world of difference between a production ceiling rule and a strikebreaking rule, and therefore a world of difference in the time when leaving the union may fairly abrogate observance of the one rule but not the other. And it is just the demands of a strike situation, which the Court did not at all address in *Scofield,* which make the difference.

Accordingly, this Court's phrasal reference to "union members who are free to leave the union and escape the rule" (394 U.S. at 430) cannot be read with the indiscriminate openendedness that the Board attributes to it. It cannot mean that freedom to leave the union is absolute allowance to shed all existing obligation regardless of their preexisting inception, current activation, and continuing exigency in an unfinished situation.

3. The Board quotes from this Court's opinion in *N.L.R.B.* v. *Marine and Shipbuilding Workers of America,* 391 U.S. 418, 424 (1968), that "§ 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned." The Board then states that "the imposition of discipline upon nonmembers can hardly be deemed an internal affair" (Pet. 41a). The Board begs the question.

The effect to be given to a mid-strike resignation on enforcement of a rule against strikebreaking is surely part of a union's "legitimate internal affairs." If the union constitution had in terms stated that a mid-strike resignation does not relieve the member of his existing duty to refrain from strikebreaking in the current controversy, the union could hardly be faulted on the ground that it was legislating on a matter which was none of its internal business (*infra*, pp. 83-84). Just and reasonable regulation of the terms on which a member may resign is an obvious function of any membership association.

The Board's error lies in its unparticularized use of the word "nonmembers." The Board packages as "nonmembers" persons who have never been union members with persons who seek to resign their existing membership and assumes that both are to be treated alike. But the two are obviously not the same in fact, and whether for particular purposes they should be treated differently in law is the question presented. That question cannot be satisfactorily answered by question-begging assumptions as to the content of "internal affairs" or the fungibility of "nonmembers."

4. The upshot is that the quotations which the Board snips from the Court's opinions simply do not answer the present question. The present question is new. There is no point to the pretense that the answer has already been given.

F. The Suggestion That a Member Is Bound To Refrain from Strikebreaking for the Duration of the Strike Notwithstanding Resignation Only if at Its Inception He Individually Assented to the Strike.

The Court of Appeals holds that a member by resigning may renounce the institutional decision to strike at least in the absence of a showing that he individually

assented to the decision initially. But it suggests the possibility that a member is bound notwithstanding resignation to refrain from strikebreaking for the duration of the strike if at its inception the member individually supported the decision to strike (Pet. 18a-19a). This suggestion cannot withstand analysis. It is certain that the legal consequence of resignation cannot turn on whether or not the member at the inception of the strike individually supported or opposed the group decision to strike.

1. The essence of the solidarity indispensable to effective strike action is that a member is bound by the institutional decision to strike whether or not he was individually opposed to that group decision. A member is required to refrain from strikebreaking despite his dissent from the decision to strike. A member does not by his dissent create a personal option to refrain from striking by resigning. Membership is not divided into two classes, one class composed of those members who by individually assenting to strike are bound to that choice for the duration of the strike, and another class composed of those members who by individually dissenting from the strike are free to abandon the strike when and as they choose by resigning. The meaning of a union is that the contrariety of individual choice is forged into a single will once the group decision is taken. The reality of unified action is that each member is bound for the duration of the strike by the group decision to strike, whatever his own original personal choice, which he cannot escape by resigning.

In short, a member who remains a member but engages in strikebreaking is unquestionably subject to discipline for his infraction despite his individual dissent from the decision to strike. A resigner is in exactly the same posture.

2. To turn the allowability of strikebreaking subsequent to resignation on a showing of a member's individual original dissent from the strike decision is incompatible with the variety of means by which unions make strike decisions. Federal law does not, and state law cannot, prescribe the means by which unions make strike decisions (*International Union, United Automobile Workers* v. *O'Brien*, 339 U.S. 454 (1950)); indeed, federal law "does not require majority authorization for any strike" (*id.* at 458). Instead, the means by which strike decisions are made within a union are exclusively a matter of union self-government and internal organization. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958).

There are three principal methods by which strike decisions are made within a union: (a) by open vote of the members; (b) by secret ballot of the members; and (c) by the members' delegation of the strike decision to a strike committee or similar body. Only where the decision is made by open vote is it at all ascertainable what the member's original choice may have been, and even then the evidentiary problems of reliable after-the fact determination would be formidable. Where the decision is by committee, the member's only formal participation in the process is to designate the constituency of the committee; he does not himself vote. Where the decision is by secret ballot, the whole point of that method is that the member's individual vote shall not be known. Accordingly, when two of the three principal means by which strike decisions are made do not and cannot disclose the member's original individual choice, it is a practical impossibility to make the legal consequence of resignation turn on whether at the inception of the strike the member supported or opposed the strike decision.

3. The predominant means by which strike decisions within a union are made is by secret ballot.[54] The method required of its subordinate units by the IAMAW is typical. Thus, in this case, in order to authorize the strike, a strike vote by secret ballot was mandatory, a three-fourths majority vote in favor of the strike was necessary to call the strike, and the strike call was further dependent on having the sanction of the Executive Council of the International Union (*supra*, p. 4).[55]

As thus presented in the typical posture of the IAMAW's method of calling a strike, the heart of the question is whether the minority is bound by the majority's choice to strike made in a secret ballot election. The answer rests in the indispensability to effective labor action of binding the entirety of the members for the duration of the strike to the institutional decision to strike that the majority has made. And the essence of a secret ballot is its secrecy, a secrecy which must be broken if effect is to be given to the notion that a member is bound by the institutional decision only if he himself individually favored it when it was made. In short "the majority rules" (*J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 339 (1944)), and within the compass of effective strike action there is no room for individual defec-

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[54] See the unpublished study, Collective Bargaining and Strike Provisions of National Union Constitutions, prepared for the use of the Federal Mediation and Conciliation Service by Herbert J. Lahne, a Department of Labor economist, reprinted at pp. 15a-20a of the appendix to the brief of the IAMAW as amicus curiae in *Granite State*.

[55] In 1970, the IAMAW amended its Constitution to require a two-thirds rather than a three-fourths majority vote to call a strike.

tion from the collective decision, whether or not the member was personally for or against the strike at its inception

G. There Is No "Statutory Policy" Which Militates Against Interpreting a Prohibition Against Strikebreaking as Requiring a Mid-Strike Resigner To Refrain from Strikebreaking for the Future Duration of the Existing Strike.

We return to our starting point. In this case, the provision of the IAMAW Constitution pursuant to which the resigners were disciplined proscribed "accepting employment . . . in an establishment where a strike . . . exists" (*supra*, p. 5). This provision does not specify whether or not it applies to bar strikebreaking in an existing strike subsequent to resignation. The Board would read the prohibition as a bar against "accepting employment . . . in an establishment where a strike . . . exists" *except* following resignation. The Union interprets it as a bar against "accepting employment . . . in an establishment where a strike . . . exists" *notwithstanding* resignation. As between the two rival interpretations of a union constitutional provision—one barring strikebreaking *except* following resignation and the other barring it *notwithstanding* resignation—the choice is obvious. A union constitution premised on maintaining strike solidarity simply cannot be rationally read to allow strikebreaking. We need hardly add that "Courts are reluctant to substitute their judgment for that of union officials in the interpretation of the union's constitution, and will interfere only where the official's interpretation is not fair or reasonable." *Vestal* v. *Hoffa*, 451 F.2d 706, 709 (C.A. 6, 1971), cert denied, 406 U.S. 934 (1972). See also, *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 241-245 (1971).

Insight may be afforded by looking at the issue as if the result for which we contend had been incorporated in the constitution in so many words, as it now indeed is (*supra*, p. 58). The constitution would then read, as it presently does, substantially as follows: resignation in anticipation or in the course of a strike shall not relieve the member from his duty to refrain from strikebreaking in the upcoming or existing strike. Such an explicit restriction would doubtless be given effect. A constitution may limit resignation to the manner and on the conditions prescribed, so long as the restrictions are just and reasonable.[56] To require that a present member refrain from strikebreaking in an existing or impending strike is obviously a just and reasonable restriction upon resignation.

In the absence of such explicitness, then, the question is whether the implication of that restriction better approximates the just and reasonable expectation of the parties than does the implication that resignation forthwith frees the erstwhile member to engage in strikebreaking. Since it is a union constitution that we are interpreting, and the imperative of a membership relationship which is at issue, it is perfectly patent that the implied terms on which the relationship may be dissolved fairly and reasonably contemplate that the existing obligation of loyalty to the union politic to refrain from strikebreaking shall at the least endure for the duration of the current controversy in which the en-

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[56] *N.L.R.B.* v. *International Union, United Automobile Workers*, 320 F.2d 12 (C.A. 1, 1963). Section 65(3) of the British Industrial Relations Act of 1971 provides that, "Every member of the organisation shall have the right, *on giving reasonable notice and complying with any reasonable conditions*, to terminate his membership of the organisation at any time." (Emphasis supplied.)

tirety of the membership is engaged and in which utter unity is indispensable.

But, says the Board, "statutory policy" is opposed to that implication (Pet. 41a-43a). The Court of Appeals similarly says that "an extremely important national policy militates against the imposition of such an implied obligation" (Pet. 17a). But neither is willing to commit itself to the view that an explicit restriction against strikebreaking in an existing strike subsequent to resignation would violate Section 8(b)(1)(A) of the Act. The Board on brief in *Granite State* contented itself with the statement that it "has not yet had occasion to consider whether a different accommodation would be warranted where the union's constitution or bylaws expressly limited the right of a member to resign during an ongoing strike" (p. 17, n.14). The Court of Appeals similarly expresses "no opinion . . . concerning the legality" of such a provision, and it likewise "intimate[s] no view regarding the legality of any such provision expressly imposing a continuing obligation on any resigning member to refrain from strikebreaking during a work stoppage which was properly commenced prior to the time of the resignation" (Pet. 20a, n.20).

This straddle will not do. The statute either does or does not allow a union to bind a mid-strike resigner to a duty to refrain from strikebreaking in an existing strike. If it does, no "statutory policy" is offended because the restriction is implied rather than express. A statute which countenances an express restriction does not permit the invention of a "statutory policy" which condemns an implied restriction. The Board and the Court of Appeals cannot shelter their ambivalence

"in that circumambient aura, so often euphemistically described as 'the policy of the statute.' "[57]

It is therefore necessary to face up to the question that the Board insinuates but does not choose to confront. And the answer is clear. An implied restriction against strikebreaking by a mid-strike resigner does not, any more than an explicit restriction would, run afoul of the bar of Section 8(b)(1)(A) against restraining an employee in the exercise of his right to refrain from strike activity conferred by Section 7 of the Act. This is inherent in the teaching of *Allis-Chalmers*. The Court held in *Allis-Chalmers* that Section 8(b)(1)(A) does not embrace "a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines" (*supra*, p. 64). And it does not precisely because the "economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . .' " (*supra*, p. 63). This necessary maintenance of strike solidarity embraces within its natural scope disallowance of a mid-strike resignation to justify breaking the very strike which the member was duty bound to observe at its inception. The intrinsic nature of a strike commits a union member to stick with it for its duration, and it offends every concept of loyalty and duty to permit mid-voyage defection. The statute does not require a union to permit a mid-strike resignation to be used as an escape hatch to break the strike.

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[57] L. Hand, J., concurring in *McComb* v. *Scerbo*, 177 F.2d 137, 141 (C.A. 2, 1949).

This conclusion is demonstrable by returning to the specific statutory premise on which *Allis-Chalmers* rests. The predicate of that decision is that imposition of a fine for violation of a valid union rule is not under any circumstances open to contest under section 8(b)(1)(A) if the fine is enforceable only by debarment from union membership for nonpayment. Writing for the majority, Mr. Justice Brennan stated that (388 U.S. at 191-192):

> At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment.

The dissenters appear to share this view. Mr. Justice Black wrote for them, and while first seeming to reserve this matter (388 U.S. at 203), he finally stated that (*id.* at 214):

> . . . I have already indicated that the proviso to § 8(b)(1)(A) may preserve the union's right to impose fines which are enforceable only by expulsion and that expulsion was the common mode of enforcing fines at the time the section was adopted.

The issue which divided the Court in *Allis-Chalmers* was, not whether section 8(b)(1)(A) prohibited a fine that was enforceable solely by debarment from union membership, but whether court action to collect the fine was a permissible added sanction. The Court of course held that it was. "A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled" (*id.* at 192).

The identical analysis is applicable to the strikebreaker-resigner as to the strikebreaker-member. If

the penalty imposed on the resigner were a fine, but if enforcement of the fine were limited to debarment of the resigner from reacquisition of membership in the union until the fine were paid, the sanction for nonpayment would be expressly privileged by the proviso to section 8(b)(1)(A), for it would be confined to "the right of the labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." In this situation, as the Court of Appeals for the Fifth Circuit has held, the "sanction for nonpayment of the fine was . . . confined to the 'acquisition or retention of membership,' a domain which is reserved to the Union under the Act" *Local 1255, IAMAW* v. *N.L.R.B.*, 456 F.2d 1214, 1217 (1972). The Fifth Circuit explained that (*ibid.*):

> We believe the Union's right to expel a member, or deny readmission to an ex-member, for not paying a fine is clearly protected by the proviso to § 8(b)(1)(A). The proviso makes no distinction between acts done while a member and those done while not a member. Either may be taken into consideration in determining who is to be admitted to membership or retained as a member. There is no doubt that the Union could have expelled . . . [the defector] unconditionally for strikebreaking. It seems that if the Union may absolutely bar him from membership it may conditionally bar him subject to the payment of a fine.
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> In summary, we hold only that a union member who resigns during a strike and crosses his union's picket line to return to work may be fined by the union for his postresignation strikebreaking when the fine is enforceable only by expulsion from the union.

The Board has since adopted the position and rationale expressed by the Fifth Circuit in this situation. *Pat-*

tern Makers' Assn. (Lietzaw Pattern Co.), 199 NLRB No. 14, 81 LRRM 1177 (1972).

At this juncture we reach the same point in the analysis that the Court confronted in *Allis-Chalmers*. As a fine for strikebreaking, enforceable by debarment from the union until the fine is paid, may be levied alike against the strikebreaker-member and the strikebreaker-resigner, the only question which remains is whether court action to collect the fine is a permissible added means of enforcement. The Court in *Allis-Chalmers* held that court enforcement of the fine was allowable against the strikebreaker-member, and there is no slightest reason why it should not also be allowable against the strikebreaker-resigner. In either case the "efficacy of a contract is precisely its legal enforceability. A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled" (388 U.S. at 192).

We anticipate that we will be told on brief in this case, as we were told on brief in *Granite State*, that as a constituent of a member's "right" to refrain from strike activity, a member should be free to abandon the strike without risking union discipline for his defection, whenever the hardship of striking becomes greater than he cares to bear, so long as he is willing by resigning to give up the benefits of union membership; this is called "reasonable accommodation" (Bd. br. in *Granite State* pp. 17-18, 21). We call it strikebreaking. We are "accommodated" out of the means of enforcing discipline to maintain the strike solidarity essential to effective strike action. We are in the name of a "fair balance" required to favor the summer soldier and the sunshine patriot to the detriment of the steadfast striker who rightfully relied on group unity when

the strike was undertaken. And we are gifted with this cost-benefit analysis, not by the Board whose opinion will be searched in vain for it, but by "appellate counsel's *post hoc* rationalizations for agency action", a wholly impermissible basis on which to sustain administrative decision. *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-444 (1965); see also *F.T.C.* v. *Sperry and Hutcheson Co.*, 405 U.S. 223, 245-250 (1972).

Indeed, were the Board to say that a mid-strike resignation must be given effect to allow subsequent strikebreaking, it would arrogate to itself a role which is statutorily denied it. A union's refusal to countenance a mid-strike resignation as an excuse for strikebreaking is a union's use of one part of its economic weaponry to secure satisfactory contract terms. To maintain that a union is required by law to tolerate mid-strike desertion through resignation is thus to assert the statutory power to divest the union of one means of waging economic warfare. Yet it is central to this statute that the Board has no such power. It is not to function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands"; it is not "to sit in judgment upon every economic weapon the parties to a labor contract negotiation employ . . . ." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 497-498 (1960). The Board has no authority to "balance" away the union's or the employer's means of self-protection. *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 316-318 (1965); *N.L.R.B.* v. *Brown*, 380 U.S. 278, 290-292 (1965). Whether a union should continue or abandon a strike, and the weighing of hardship and advantage which enters into that

choice, is a decision to be made institutionally, and it destroys the very fabric of the union community to allow it to be unmade individually.

In short, when a union reads its prohibition against "accepting employment . . . in an establishment where a strike . . . exists" to bar strikebreaking in an existing strike subsequent to resignation, it is making an interpretation of the prohibition which is in utter harmony with its underlying purport. And when it is said that such an interpretation runs afoul of "statutory policy," the assertion bespeaks ignorance of what strike solidarity means and disrespects the limitation on the Board's power against intermeddling in the economic weaponry employed to wage economic warfare.

CONCLUSION

For the reasons stated the judgment below should be reversed and the case remanded to the Court of Appeals with directions (1) to affirm that part of the Board's order dismissing the portion of the complaint which rests on the alleged unreasonableness of the fines, and (2) to set aside that part of the Board's order granting relief which rests on the conclusion that the Union may not discipline postresignation strikebreaking by imposition of a court-collectible fine.

Respectfully submitted,

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February 1973

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Supreme Court of the United States

October Term, 1972

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY

No. 71-1607

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE BOEING COMPANY, AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This brief *amicus*, in support of the position of Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

I

The first of the two questions presented here is whether § 8(b)(1)(A) of the National Labor Relations Act empowers the National Labor Relations Board to review union fines, enforceable in court, which have been imposed upon members who violate a valid union rule (here a prohibition on crossing a picket line during a strike), to determine whether those fines are excessive in amount.

This is the fifth case in the line stemming from *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, raising an issue as to the scope of the Board's authority to oversee the process by which union members define the norms regulating the conduct of their affairs, develop procedures for the adjudication of alleged violations, and determine the scale of appropriate sanctions. See also *NLRB* v. *Marine & Shipbuilding Workers*, 391 U.S. 418; *Scofield* v. *NLRB*, 394 U.S. 423; *NLRB* v. *Granite State Joint Board*, ... U.S. ....., 41 U.S.L.W. 4074 (Dec. 7, 1972). Moreover, in delineating the preemptive effect of the NLRA, this Court has repeatedly addressed itself to the interplay between § 8(b)(1)(A) and the state and federal (the Labor Management Reporting and Disclosure Act of 1959) law enforceable in court that regulates union discipline. See *Machinists* v. *Gonzales*, 356 U.S. 617; *Plumbers Union* v. *Borden*, 373 U.S. 690; *Iron Workers* v. *Perko*, 373 U.S. 701; *Boilermakers* v. *Hardeman*, 401 U.S. 233; *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274. This sustained attention to the ramifications of § 8(b)(1)(A) requires, as

the first step in analysis, an explication of the basic principles developed in those cases.

1. Initially, there can be no doubt that every aspect of the right to enact and enforce disciplinary rules is sharply circumscribed. The inhibitions on union action designed to assure that a member charged with an offense will be dealt with honestly, fairly, and in accordance with public policy, are comprehensive. The complex of public law, which includes § 8(b)(1)(A) as one of its strands, only "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield*, 394 U.S. at 430. And the injunction against unreasonable enforcement finds its major expression in the state law invalidating excessive penalties. "[S]tate courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship'." *Allis-Chalmers*, 388 U.S. at 193, n. 32. Thus we acknowledge at the outset that "a union rule * * * forbidding the crossing of a picket line during a strike," the subject matter here, must be "duly adopted and not the arbitrary fiat of a union officer," and can only be enforced "against voluntary union members by expulsion or a reasonable fine." *Scofield*, 394 U.S. at 428.

To state the full range and breadth of the substantive law both administrative and judicial, state and federal, however, is not to fix the metes and bounds of the prohibitions contained in § 8(b)(1)(A). The two are not coextensive. This Court, from the first, has recognized that in enacting that section Congress intended to grant the

Board a sharply restricted authority. "The protection of union members in their rights as members from arbitrary conduct by unions and officers has not been undertaken by [the] federal law [embodied in the NLRA], and indeed * * * [in] the proviso to § 8(b)(1) * * * the assertion of any such power has been expressly denied." *Gonzales*, 356 U.S. at 620. Section 8(b)(1)(A) and its proviso, in the Board's words, "precludes * * * [Board] interference with [the] internal affairs of a labor organization." *Minneapolis Star & Tribune Co.*, 109 NLRB 727, 729. Thus:

> "The fairness of an internal union disciplinary proceeding * * * can [not] be said to raise issues 'within the special competence' of the NLRB. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181, 193-194 (1967). As we noted in that case, the 86th Congress which enacted § 101(a)(5) [of the LMRDA which guarantees procedural due process] was 'plainly of the view' that the protections embodied therein were new material in the body of federal labor law. 388 U.S., at 194. And that same Congress explicitly referred claims under § 101(a)(5) not to the NLRB, but to the federal district courts." *Hardeman*, 401 U.S. at 239.

Indeed, even the LMRDA, the statute in which "Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline" (*Allis-Chalmers*, 388 U.S. at 194), is "more limited in scope than much state law" (*Hardeman*, 401 U.S. at 244, n. 11). While the LMRDA insures members charged with an offense procedural due process, and prohibits discipline for the exercise of freedom of speech or

assembly, it does not place any limitations on the sanctions which may be imposed on a member who has been found to have violated a valid union rule in a fair proceeding. It is therefore true today, as it has been throughout the evolution of our federal labor policy, that, in general, "the regulation of the relationship between union and employee is a contractual matter governed by local law" which constitutes a "federally unentered enclave." *Scofield* 394 U.S. at 426 n. 3.

2. The issue before the Court narrows then to determining the precise role § 8(b)(1)(A) was intended to fill in the overall regulation of union discipline.

As such early decisions as *Minneapolis Star & Tribune*, and *National Maritime Union*, 78 NLRB 971, 982-987 enforced 175 F 2d. 686 (C.A. 2), demonstrate, it has been understood from the outset that the primary function of § 8(b)(1)(A) is to prevent "the union from inducing the employer to use the emoluments of the job to enforce the union's rules," and to proscribe "union coercion, such as physical violence to induce employees to join the union or to join in a strike." *Scofield*, 394 U.S. at 428 n. 4, 429. And in *Allis-Chalmers* this Court:

> "essentially accepted the position of the National Labor Relations Board dating from Minneapolis Star & Tribune Co., * * * where the Board also distinguished internal from external enforcement, * * * in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority." *Scofield* 394 U.S. at 428.

Thus, § 8(b)(1)(A) interdicts "means unacceptable in themselves, such as violence or employer discrimination," while leaving the regulation of "internal technique[s of enforcement such as] union fines, collected by threat of expulsion or judicial action" to the courts. *Id.* at 430-431.

There are two caveats, both necessary to preserve the overall integrity of the NLRA, to the proposition that so long as the union limits itself to "internal techniques" of enforcement, the Board has no regulatory role to play. As such recent cases as *Charles S. Skura*, 148 NLRB 679, and *NLRB* v. *Marine & Shipbuilding Workers*, 391 U.S. 418, demonstrate, even purely internal means of enforcement, such as expulsion, are subject to Board review to ascertain "the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated." *Scofield*, 394 U.S. at 431. Union rules which interfere with the right of the Board to entertain charges, thereby "frustrat[ing] the enforcement scheme established by the statute" (*id.* at 430), are, therefore, beyond the ambit of "the internal affairs of the union" protected by § 8(b)(1)(A)'s proviso (*Marine & Shipbuilding Workers*, 391 U.S. at 425).

On the other hand, "as Allis-Chalmers and Marine Workers made clear, it does not follow from * * * the fact that the rule has and was intended to have an impact beyond the confines of the union organization * * * that the enforcement of the rule violates § 8(b)(1)(A), unless some impairment of a statutory labor policy can be shown." *Scofield*, 394 U.S. at 432. The NLRA is "not aimed at completely internal union discipline of union members, even though the discipline may result in the member's refusal to

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accept work offered by the employer. Allis-Chalmers makes this quite clear." *Id.* at 435-436. The Act does not grant union members a right to work for a struck employer in violation of a union rule against strikebreaking. Internal union discipline "to protect against erosion, its status" as exclusive bargaining agent (*Allis-Chalmers*, 388 U.S. at 181) is permissible. While union-induced employer discrimination for crossing a picket line during a strike in violation of a union rule is proscribed because that means of securing the union's ends is "unacceptable in [it]self" (*Scofield*, 394 U.S. at 431); union fines enforceable in court for the same offense are lawful because both the end sought, and the means utilized, comport with the letter and policy of the Act. Thus, where the union rule in question is valid, the "policy of the Act is to insulate employees' jobs from their organizational rights" by assuring that as "an employee, he may be a 'good, bad, or indifferent' member so long as he meets the financial obligations of the union security contract; * * * but as a union member, so long as he chooses to remain one, he is subject to union discipline." *Id.* at 429 n. 5.

Finally, since its proviso only serves to carve Board regulation of the union-member relationship out of §8(b)(1)(A), enforcement of union rules against former members who have lawfully resigned is an unfair labor practice:

> "The *Scofield* case indicates that the power of the union over the members is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in con-

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duct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street." *Granite State,* 41 U.S.L.W. at 4075.

In sum, under the present regime, the Board is empowered to protect members from discipline through employer discrimination or violence, to assure that union discipline is not predicated on rules inconsistent with the NLRA's policies, and to preclude discipline of non-members. But that agency's mandate ends where the union acts against a "member as a member rather than as an employee" (*Wisconsin Motor Corp.*, 145 NLRB 1097, 1104), to vindicate a rule which is consistent with the NLRA's policies.

3. The central lesson of the legislative history of § 8(b)(1)(A), and the language of its proviso, is that "it was not the intent of the sponsors in any way to regulate the internal affairs of unions." *Allis-Chalmers,* 388 U.S. at 191-192. The law as summarized above is consistent with that intent. Section 8(b)(1)(A), as it has been interpreted thus far, interdicts "external" means of enforcement, measures union rules against external standards embodied in the NLRA, and prohibits the imposition of union sanctions against non-members, *i.e.* individuals external to the organization. On the other hand, the great bulk of union disciplinary proceedings are not subject to Board regulation. So long as the union confines itself to enacting rules which do not conflict with the NLRA, alleged

defects in the trial and punishment of a member as a member are solely for the courts.

If the phrase "internal union affairs" is to be given any content, it must include the processes designed to adjudicate alleged violations of valid union rules. It follows that if this core area is opened to Board review on a case-by-case basis, nothing is left of the Congressional intent to leave significant aspects of the union-member relationship unregulated by the NLRA. And it is plain from the list of criteria proposed by the court below[1] that a reading of § 8(b)(1)(A) which would require the Board to review the judgments reached by union trial boards to ascertain whether they have acted properly in assessing a fine enforceable in court does entail supervision of union discipline on a case-by-case basis. The factual combinations and permutations which must be considered under this standard are limitless and are all but impossible to capture in *per se* rules.

Nor is there any rational way to limit Board intrusion into union affairs to the review of the validity of the sanction imposed. There is nothing in the Act, and no overall scale of values, which justifies the conclusion that an

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[1] "The reasonableness of a fine would necessarily have to be determined in light of the circumstances leading to its imposition. Such factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined for strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, the availability of other less harsh union remedies, and many other similar considerations would clearly be relevant." Pet. App. 29.

"excessive" fine imposed after proper procedures is more subject to censure than a "reasonable" fine imposed without procedural due process. Indeed, the guidance Congress has given in Title I of the LMRDA indicates that while preservation of procedural due process is a federal concern, the scale of the sanctions imposed after a fair trial is not.

By the same token, there is no principled distinction which would draw the line at Board regulation of discipline in picket line cases. In *Allis-Chalmers* this Court was unanimous in recognizing "the validity of the union rule against its members crossing picket lines during a properly called strike * * *." 388 U.S. at 198 (Mr. Justice White, concurring). The argument for Board regulation of the size of a fine imposed for a violation of that rule must, therefore, proceed on the theory that "excessive" fines violate § 8(b)(1)(A) even though the union's ultimate object is entirely compatible with the policies of the Act. And if the substantive validity of the rule does not preclude Board jurisdiction in the instant cases, it follows that the Board also has the obligation to scrutinize the reasonableness of fines for wildcat activity, for participation in a breach-of-contract strike, and as *Minneapolis Star & Tribune* indicates (109 NLRB at 737), even for refusals to attend union meetings.

Thus, the rationale of the decision below completely undermines the distinction between "internal and external enforcement" of union rules developed by the Board, and "essentially accepted" by this Court (*Scofield*, 394 U.S. at 428), to express the congressional judgment that " 'purely internal union matters' [are] a subject the National Labor Relations Act leaves principally to other processes of law"

(*Lockridge*, 403 U.S. at 296). The closest the lower court came to providing a statutory predicate for this novel expansion of the Board's jurisdiction was the suggestion that "[w]here a disciplinary fine is unreasonably excessive, it may possibly affect the employee's employment status as adversely—and possibly even more adversely—as an illegally obtained employment suspension" and that such a result is contrary to the "protective policy of the Act" against penalties which would "impare the members status as an employee." Pet. App. 30a. But this is to misstate the policy of the Act. *Allis-Chalmers* squarely holds that the Act does not protect an employee against internal union discipline—including court-enforced fines—designed to "result in the member's refusal to accept work offered by the employer" (*Scofield*, 394 U.S. at 436). The policy of the Act this Court has deemed to be controlling is that "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent * * *." *Allis-Chalmers*, 388 U.S. at 181. This power plainly encompasses court-enforced fines for strikebreaking sufficient to secure complete compliance with the union's rule. For nothing less will achieve the objective sanctioned in *Allis-Chalmers*—the maintenance of strike solidarity through internal union discipline. To be sure the union is not permitted to achieve the same objective through union-induced employer actions against employees. But this limitation is not based on the view that union members who work for a struck employer despite their union's contrary rule are to be assured of a profit for their violation. Rather, it finds its roots in "the explicit wording of § 8(b)(2)" which was intended to "limit union power to compel an

employer to discharge a terminated member," but was not intended "to interfere with union self-government or to regulate a union's internal affairs." *Allis-Chalmers*, 388 U.S. at 195.

Allis-Chalmers is instinct with the proposition that internal union discipline to preserve strike solidarity is an "economic weapon" which "is part and parcel of the system" and which "acts as a prime motive power for agreements in free collective bargaining" (*NLRB* v. *Insurance Agents International*, 361 U.S. 477, 489). And the critical role played by "the presence of economic weapons in reserve" in the bargaining process has caused this Court to stress the point that neither the Board nor the courts are empowered to strike such weapons from the parties' hands without a specific warrant from Congress. Any other rule would allow an administrative agency, or the judiciary, to exercise a "considerable influence upon the substantive terms on which the parties contract" since "negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." *Id.* at 490. The right acknowledged in *Allis-Chalmers*, for example, would be rendered meaningless if, as proposed by the court below, it could be whittled down to the point where union members would be assured that they will be better off if they violate the union's rules than if they obey them. Such "influence" is, therefore, forbidden because "our labor policy is not presently on a foundation of government control of the results of negotiations." *Insurance Agents*, 361 U.S. at 490. The national labor policy does not allow the Board, or the courts, "to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and

'abusive' economic weapons into * * * the Act." *Id.* at 497-498; *see also, Porter Co.* v. *NLRB*, 397 U.S. 99, 102-104, 107-108. Thus, the statutory content the lower court would provide to elucidate the concept of excessive fines is based on a misunderstanding of what the NLRA is all about. Neither the state courts, if they are to regulate union fines on their own, or those courts and the Board in the exercise of concurrent jurisdiction, may disregard the paramount policy of the Act precluding the invalidation of a fine merely sufficient to secure "the member's refusal to accept work offered by the employer" (*Scofield*, 394 U.S. at 436). See *Insurance Agents*, 361 U.S. at 489-490, 497-498; *Bus Employees* v. *Missouri*, 374 U.S. 74; *Teamsters Union* v. *Morton*, 377 U.S. 252.

4. The legal analysis contained in the decision below is, as we have attempted to demonstrate, inadequate to sustain the result reached. That decision is, however, fully adequate in revealing the concerns that animated the court below. The arguments developed therein make it plain that the lower court believed that there should be a uniform federal law enforced by the Board which regulates all forms of union discipline that touch the employment relationship, and that this law should be grounded in a policy of protection for members who wish to work in violation of the union's rules.

"But Congress's policy has not yet moved to this point" (*Insurance Agents*, 361 U.S. at 500). The substantive law of § 8(b)(1)(A), as it stands, does not grant union members the right to violate union rules against crossing picket lines or exceeding production quotas, free of internal union discipline effective to secure "the members refusal to accept work offered by the employer" (*Scofield*, 394 U.S. at 436). Congress chose instead to simply prohibit enforcement of

valid union rules by union induced employer discrimination or violence. See pp. 5-8 *supra.*

Moreover, the decision to exclude Board oversight of internal techniques of enforcing union rules even though they relate to the employment relationship is no isolated anomaly. A case can be made for centralizing all aspect of labor law in a single federal statute enforced by a single tribunal staffed by government prosecutors. But Congress has chosen to provide the Board with a narrower range of questions to answer. The scope of unreasonable employer action detrimental to employees untouched by the NLRA is vast. It is captured in the rubric that employer discipline is not an unfair labor practice if imposed for good reason, bad reason, or no reason at all so long as it is not an anti-union reason. See, e.g., *NLRB* v. *Nabors,* 196 F.2d 272, 275 (C.A. 5) cert. denied 344 U.S. 865. And it is, of course, equally well settled that the parties are free to utilize "economically harassing" bargaining tactics not specifically prohibited without running afoul of the Act. See pp. 12-13 *supra.*

The foregoing are instances in which federal law does not condemn that which might well be condemned. But even where Congress chooses to interdict conduct logically related to that regulated by the NLRA it has not invariably chosen to entrust enforcement to the Board, even where the contrary decision entails the drawing of lines more nice than obvious. The classic example is the enforcement of collective agreements. The ultimate purpose of the NLRA, in the words of § 1, is to "encourag[e] the practice and procedure of collective bargaining." And §§ 8(a)(5), 8(b)(3) and 8(d) impose substantial continuing responsibilities on

the Board during a contract term. See *NLRB* v. *C&C Plywood Co.*, 385 U.S. 421. But in passing § 301, and rejecting the proposed § 8(a)(6) of S. 1126, 80th Congress, 1st Sess., "Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements and that such matters should be placed within the jurisdiction of the courts." *C&C Plywood*, 385 U.S. at 427 (footnotes omitted).[2]

In short, both the specific language and legislative history of § 8(b)(1)(A) and the overall pattern of the Act support the Board's conclusion that:

> "The Board has long recognized that, as a practical matter, 'virtually all union rules affect a member's employment relationship.' However, given the legitimacy of the rule, the only question of relevance to the agency enforcing this Act is 'whether, in enforcing the rule, the Union goes outside the area of union-membership relationship and enters the area of employee-employer relationship.' The Union has not done so here, nor has it sought to vindicate a policy in conflict with the National Labor Relations Act, and the Act does not authorize this Board to evaluate the fairness of union discipline meted out to protect a legitimate union interest."

II

In *Granite State Joint Board*, this Court recognized that

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[2] This pattern of fragmenting responsibilities that might well be unitary is not confined to the allocation of jurisdiction between the Board and the courts. It is also a prominent aspect of the LMRDA. For example, regulation of union elections procedures is divided between Title I, enforceable by private suit, and Title IV enforceable solely by the Secretary of Labor. The resulting allocational problems were explored in *Calhoon* v. *Harvey*, 379 U.S. 134.

"under § 7 of the Act the employees have 'the right to refrain from any or all' concerted activities relating to collective bargaining or mutual aid and protection;" and that so long as "no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union" is presented, the Board is "to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from association, as he sees fit 'subject to any financial obligations due and owing' the group with which he was associated." Thus "where, as [in Granite State], there are no restraints * * * [stemming from] the contractual relationship between union and member * * * on the resignation of members," the Court concluded that "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May." 41 U.S.L.W. at 4075.

The Machinists Constitution now expressly provides, in a provision which took effect January 1, 1973:

> "Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 11 days preceding its commencement."

Moreover, at the time the instant case arose the Union's Constitution prohibited a member from "[a]ccepting employment in any capacity in an establishment where a strike * * * exists." And the Union has consistently interpreted this prohibition as requiring a member to abstain

from strikebreaking for the duration of an existing strike notwithstanding a mid-strike resignation.

The statutory question presented here is, therefore, whether a constitutional provision conditioning the right to resign union membership on a continuing commitment not to break a strike in progress (or in immediate contemplation), is valid under the proviso to § 8(b)(1)(A).[3]

Section 8(b)(1)(A) prohibits restraint and coercion of employees in the exercise of § 7 rights, and its proviso preserves "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *." The provision in the Machinists Constitution conditioning the right of members to resign during a strike on the continued commitment to the obligation, undertaken during membership, to respect the strike, is squarely within the proviso's language—it is a "rule with respect to the * * * retention of membership." Thus, to the extent that it can be said that this inhibition on resignation at will and free of all continuing obligations, restrains and coercises union members in the exercise of § 7 rights, it is precisely "[s]uch restraint and coercion [that] Congress permitted by adding the proviso to § 8(b)(1)(A)" (*Allis-Chalmers*, 388 U.S. at 198, Mr. Justice White concurring.)

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[3] The following question as to the proper construction of the Machinist's Constitution is also presented—whether, assuming arguendo that such provisions are valid, the provision in the Union's Constitution in force at the time the instant case arose, was sufficiently express to impose a restraint on post-resignation strikebreaking. This latter question is treated in detail in the Machinist's brief, and we incorporate the Union's discussion in this brief at this point as if it were our own.

Moreover, the Union's rule is one which can survive the most searching scrutiny as to "the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated" (*Scofield*, 394 U.S. at 431).

The interest vindicated is that specified in *Allis-Chalmers*, 388 U.S. at 181; "to protect against erosion [the union's] status" as collective bargaining representative during the "vital [juncture] when the members engage in strikes." For:

> "To say that Congress meant in 1947 by the § 7 amendments and § 8(b)(1)(A) to strip unions of the power to fine members [who resign during a strike] for strike-breaking * * * is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon * * * [w]here the union is weak, and membership therefore of little value * * *." *Id.* at 183.

And the method chosen to vindicate that interest is perfectly consistent with the policy of the Act. *Granite State* holds that where the union's constitution is silent, the § 7 right to refrain from concerted activity protects the right to resign. But as *Allis-Chalmers* and *Scofield* demonstrate, the § 7 "right to refrain" does not grant union members the freedom to disregard the union's rules at will. It is not a license to join a union as a full member under one's own terms. For, § 7 also provides an equal right "to form [and] join * * * labor organizations." And an organization with rules that all may disobey is a contradiction in terms. It is an anarchy. The right to asso-

ciation to further common goals presupposes the right to enact and enforce membership obligations. "The Act clearly contemplates a membership organization and hence the existence of criteria for the acquisition, transfer, and loss of membership." Cf. *Ricci* v. *Chicago Mercantile Exchange*, ... U.S. ....., 41 U.S.L.W. 4097, 4102 (Jan. 9, 1973). And to the extent this is not plain from § 7 itself, it is made explicit in the proviso to § 8(b)(1)(A). The § 7 right to refrain from concerted activity can not, therefore, be expanded to the outer limits of its logic; for if it were, it would render the § 7 right to engage in concerted activity, as amplified by the proviso to § 8(b)(1)(A), a nullity. This portion of the Act, like others:

> "represented the Congressional response to competing demands * * * Had Congress thought one or the other over-riding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable." *Local 1424 Machinists* v. *NLRB*, 362 U.S. 411, 418 n. 7.

That line has been marked out with precision in *NLRB* v. *UAW*, 320 F.2d 12, 15-16 (C.A. 1) where the court upheld a requirement, which limited resignation to a specified period during each year, intended to insure "uniform practices to preserve [the union's] financial standing by establishing reasonable times for resignations by those who were in good standing:"

> "Under Section 7 * * * the employee has indeed the unfettered right to abstain from indulging in union activity. He need not 'form,' 'join' or 'assist' a labor

> organization and * * * this inactivity cannot be the source of recriminations. It is by now too clear for citation that this facet of Section 7 was designed to prevent forcing the unwilling worker into a union.
>
> "However, we believe that it is quite another thing when the employee eschews his 'reluctance' and voluntarily joins a labor organization. At this point, under our view, the employee takes off the protective mantle of Section 7's 'refraining' provision and renders himself amenable to the reasonable internal regulations of the organization with which he chooses to cast his lot. * * *
>
> "In short, we believe that the Union's Constitution and By-laws—here relevant—were valid and viable provisions with which the employees had to comply if they desired to effectively sever their relationship with the Union. It is true that under section 7 of the Act * * * the subject employees need not have joined the Union. However, once they voluntarily took that step, they embraced not only the benefits but also the burdens which flowed from their union membership. One of those 'burdens' was the duty of comporting with the Union's reasonable internal regulations * * *."

In contrast, then, to the right to file charges with the Board, which is an absolute (*Marine & Shipbuilding Workers*, 391 U.S. at 425), the § 7 right to refrain from concerted activity, and the right to resign, which is derived therefrom, are qualified. While employees who voluntarily assume full membership, and by so doing subject themselves to the "provisions defining punishable conduct and the procedures for trial and appeal [that] constitute part of the contract between member and union" (*Allis-Chalmers*, 388 U.S. at 182), "are free to leave the union and escape the

rule" (*Scofield*, 394 U.S. at 430), that freedom is subject to reasonable union rules. And there can be no doubt that it is reasonable to condition resignation during, or in immediate contemplation of, a strike, on continued adherence to the union's rule against strikebreaking.

As already noted (p. 19 *supra*), the end sought—preservation of strike solidarity—is legitimate under *Allis-Chalmers*. And the restriction imposed on the members freedom of action is precisely attuned to the exact achievement of that end and no more. The individual's opportunity to determine whether he will engage, or refrain from engaging, in concerted activity takes precedence up to the point at which its exercise would destroy the group's opportunity to evaluate its true strength in making its final calculation as to whether to capitulate to the employer or commit itself to utilization of "the ultimate weapon in labor's arsenal for achieving agreement upon its terms," (*Allis-Chalmers*, 388 U.S. at 181). Even after that point the individual may dissolve all his ties to the union except the one essential to permit it to prosecute the strike. And, of course, the union's reservation of authority terminates at the end of the strike—the point at which the member's prior failure to resign can no longer be said to have induced a justifiable reliance on the continuing ability to discipline him for breaches of loyalty in the face of the enemy.

In sum, the Machinists rule conditioning the right to resign is an internal union rule within the literal language of the proviso to § 8(b)(1)(A) which is entirely compatible with the NLRA's policies. Under the principles developed in this Court's decisions from *Allis-Chalmers* to *Granite State* it is therefore lawful.

CONCLUSION

For the reasons stated above, as well as those stated by the Union, the judgment below should be reversed and the case remanded to the Court of Appeals with directions to affirm that part of the Board's order dismissing the portions of the complaint which rests on the alleged unreasonableness of the fines, and to set aside that part of the Board's order granting relief which rests on the conclusion that the Union may not discipline post-resignation strike-breaking by imposition of a court-collectible fine.

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February, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a–33a)[2] is reported at 459 F. 2d 1143. The decision and order of the National Labor Relations Board (Pet. App. 34a–46a) are reported at 185 NLRB No. 23.

[1] This brief will discuss only the resignation question (*infra*, p. 2). The other question, respecting the Board's power to determine the reasonableness of the fine, is discussed in the Board's brief in No. 71-1607, which has been consolidated with this case.

[2] "Pet. App." refers to the appendix to the petition for certiorari in No. 71-1417. "A." refers to the separate appendix to the briefs.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–3a) was entered on March 14, 1972. The petition for a writ of certiorari was filed on May 1, 1972, and was granted on December 18, 1972 (A. 205–206). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at page 2 of the Board's brief in No. 71–1607.

QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(A) of the National Labor Relations Act by assessing, and seeking judicial enforcement of, a fine against an employee for working during a strike after his resignation from the union.

STATEMENT

The facts are fully set forth in the Board's brief in No. 71–1607 (pp. 3–7). We repeat only those facts which are relevant to the question discussed herein.

On September 16, 1965, the day after the expiration of a collective bargaining agreement between the Union[3] and the Company,[4] the Union struck and picketed the Company's Michoud, Louisiana plant in furtherance of demands for a new contract. During the 18 days that the strike continued, 143 of the 1900 production and maintenance employees represented by the Union at Michoud crossed the picket line and went to work. All of the 143 employees had

[3] Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL–CIO.

[4] The Boeing Company.

een members of the Union prior to the strike;[5] 61 rote letters to the Union resigning their membership before crossing the picket line, 58 resigned by tters sent after they went back to work, and the rest id not resign. The Union's constitution and bylaws ontained no provisions expressly permitting or forbidding such resignations from the Union (Pet. App. 0a, n. 11; A. 11, 42, 111, 118).[6]

The strike terminated on October 4, 1965, following atification of a new contract by the Union membership. In late October or early November, the Union otified all employees who had crossed the picket ne, including those who had resigned their Union embership, that charges were being brought against em under the Union constitution. The constitution rovided for the imposition of a fine or other discipline against a member who accepted "employment in

[5] The prior contract contained a maintenance-of-membership ause, which required new employees to become members of e Union as a condition of continued employment unless they otified both the Union and the Company, within 40 days accepting employment, that they did not desire to join e Union. The contract also required employees who already ere Union members to retain their membership during the rm of the contract. (Pet. App. 35a; A. 154–158.)

[6] The constitution provides that membership may be canlled where a member is delinquent for three months in the yment of dues or special levies. There is also a constitutional ovision whereby a member who ceases working at the trade who becomes a supervisor can obtain an honorary withawal card. (A. 141–142.) Union business representative Higns testified that there was no provision whereby a member uld "resign by letter": the "only way a man might resign om the International Association of Machinists, was by being arrears—honorary withdrawal card—become three months in rear in dues or be suspended by the Local, itself or by the ternational," or "by death" (A. 111).

any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission" (A. 143). Fines were thereafter imposed on all the employees who had gone to work during the strike, regardless of whether, or when, they had resigned from the Union. The Union has filed civil suits against several employees to collect the fines, plus attorney's fees and interest.

Upon a charge filed by the Company, the Board held that the Union violated Section 8(b)(1)(A) of the Act by fining those employees who had resigned from the Union before returning to work during the strike, and by fining those who had resigned after returning to work to the extent that such fines were based on post-resignation work (Pet. App. 37a–42a). But the Board held that the fines imposed on those employees who had not resigned from the Union, and those imposed on resignees for work done while they were still members did not violate the Act (Pet. App. 42a–43a). The Board's decision rested upon the rationale that the member's duty of fidelity to the Union and the Union's corresponding right to discipline him for breach of that duty are extinguished upon the member's resignation from the Union; that, since the Union constitution and bylaws had no procedure for voluntary resignation, the member was free to resign at will; and that the Union's right to discipline employees thus terminated upon receipt of the employees' letters of resignation (Pet. App. 39a–40a; 20a, n. 21).

The Board ordered the Union to cease and desist from fining employees who had resigned from the

Union for their post-resignation work during the strike, and from seeking court enforcement of such fines. It further ordered the Union to reimburse employees who had already paid fines for any amount imposed because of their post-resignation work. (Pet. App. 43a–44a.)

The court of appeals sustained the Board's factual findings and its holding that the Union violated Section 8(b)(1)(A) of the Act by fining employees who had resigned from the Union prior to returning to work, and those who had resigned after returning to work for post-resignation work (Pet. App. 16a–22a).

SUMMARY OF ARGUMENT

This Court's decision in *National Labor Relations Board* v. *Granite State Joint Board,* No. 71–711, decided December 7, 1972, requires that the decision of the court below be affirmed insofar as it sustains the Board's holding that the Union violated Section 8(b)(1)(A) of the Act by fining employees who resigned from the Union for work done after such resignation, and seeking judicial enforcement of such fines. The Union's constitution and bylaws in the instant case, as in *Granite State,* contained no express limitation on a member's right to resign. Thus, here, as in *Granite State,* members were free to resign and return to work during the course of a strike initiated while they were members.

The existence of a constitutional provision stating that union members should not work in a struck plant is not significant, since it does not indicate that the obligation continues after the member has resigned.

It is not appropriate to extend this obligation to former union members by implication in order to protect the Union's interest in unity. *Granite State* shows that considerations of mutual reliance do not warrant implying such an undertaking by union members. Moreover, since the employee's right to refrain from concerted activities is expressly protected by Section 7, a waiver of that right should not rest on implication. This conclusion is particularly appropriate here since the contract between the member and the union is a "contract of adhesion"; the member has no choice as to terms but is compelled to adhere to the inflexible ones presented. Therefore, any doubt as to the meaning of the terms should be resolved against the Union.

ARGUMENT

THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE NATIONAL LABOR RELATIONS ACT BY ASSESSING, AND SEEKING JUDICIAL ENFORCEMENT OF, A FINE AGAINST AN EMPLOYEE FOR WORKING DURING A STRIKE AFTER HIS RESIGNATION FROM THE UNION

In *National Labor Relations Board* v. *Granite State Joint Board*, No. 71–711, decided December 7, 1972, the Court reaffirmed its decision in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, that "a union did not violate § 8(b)(1) by fining members who went to work during a lawful strike authorized by the membership and by suing to collect the fines" (slip op., pp. 2–3). It held, however, that the union's authority to do is is defined by the contract between the union and its members and that, "[w]here a member lawfully resigns from a union and

thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct" (*id.* at 4). Finding no provision in the Union's constitution or bylaws limiting the circumstances under which a member may resign from the Union, the Court concluded that the members were free to resign at will, and that their right thereafter to return to work, during a strike which had commenced while they were members, was protected by Section 7 of the Act. Therefore, it ruled, the Union's imposition of court-collectible fines on the former members for such work violated Section 8(b)(1)(A).

We submit that the holding in *Granite State* requires that the decision of the court below be affirmed insofar as it sustains the Board's holding that the Union violated Section 8(b)(1)(A) by fining employees who resigned from the Union for work done after such resignation, and seeking judicial enforcement of such fines.[7]

1. The Board found (Pet. App. 40a, n. 11; A. 11), and the court below agreed (Pet. App. 19a), that the Union's constitution and bylaws in the instant case, like those in *Granite State,* contained no express provision limiting the circumstances under which a member could voluntarily resign from the Union. Although Union Representative Higgins testified (n. 6, *supra*) that a member could leave the union only

[7] The discussion in the Union's brief of the pre-*Granite State* opinions of this Court overlooks the explanation in that case of their applicability to the precise factual situation involved here and in *Granite State*. Compare slip op., pp. 2–4 with Br., pp. 74–77.

by falling in arrears in the payment of dues, by leaving the industry, or by death, the Union constitution and bylaws are simply silent on the subject of voluntary resignation. As in *Granite State*, there is no evidence here that the employees knew, or had consented to, any limitation on their right to resign during a strike.[8] Moreover, since the retention-of-membership provision of the collective agreement expired with the agreement, that provision imposed no obstacle to resignation from the Union during the strike (Pet. App. 19a).

Accordingly, here, no less than in *Granite State*, we have "only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated." *Granite State, slip op.*, pp. 3–4.

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[8] Indeed, the employees' action in sending the letters of resignation indicates the contrary (A. 10, 61, 68–69, 71, 73–74, 89, 115–117, 128–129). Although Union Representative Higgins testified that it was the Union's position at that time that a member could not resign by letter, this opinion was not communicated to the letter-writers; the letters were simply ignored (A. 110–111).

The Union seems now to agree that the resignations were valid, and relies instead on the contention that former Union members have greater obligations to the Union during a strike called while they were members than persons who have never been members (Br. 57–59, 62, 78). This argument flies in the face of the statement in *Granite State* that "when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street" (slip op., p. 4).

2. The Union seeks to distinguish *Granite State* on the ground that, while the constitution here did not expressly restrict the right to resign during a strike, it contained a provision which the Union has interpreted as obligating a former member, notwithstanding his resignation, to refrain from abandoning any strike which was called while he was a member (Br. 57–58). But, as the Union acknowledges (Br. 61, 82), this provision— which defines "misconduct by a member" to include "[a]ccepting employment in any capacity in an establishment where a strike or lockout exists * * *" (A. 142–143)—is, on its face, only applicable to a member; it does not provide that the obligation to refrain from strikebreaking continues even after the member has resigned from the Union. Nor is there any indication that the Union, prior to bringing the instant charges against former members, ever informed its members that it interpreted that provision of its constitution as imposing such an obligation on a resignee. For example, when the employees wrote their resignation letters to the Union, the Union did not advise them that the constitutional provision against strikebreaking continued to be applicable notwithstanding their resignation (n. 8, *supra*).

Accordingly, the Union's argument that its constitution commits a member to adhere to a strike notwithstanding his midstrike resignation boils down to the contention (Br. 62, 69) that—since each member depends on every other member to withhold his labor from the struck employer in order to make the strike effective—the constitution should be interpreted as

impliedly imposing such an obligation.[9] Whether or not a constitutional or bylaw provision which expressly committed a member not to resign during a strike, or to adhere to a strike notwithstanding a mid-strike resignation, would be valid for purposes of Section 8 (b)(1)(A) of the Act,[10] *Granite State* shows that the mutual reliance considerations advanced by the Union do not warrant finding such a commitment by implication. This Court there rejected the union's contention, which the court of appeals had adopted (see 446 F. 2d 369, 372–373 (C.A. 1)), that, by participating in the strike vote and in ratifying the strike penalties, the resigning employees had made an implied commitment, which the other strikers had relied on, to stay with the strike until its conclusion. Instead, it concluded that "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or

[9] That the Union, in September 1972, amended its constitution to provide explicitly that resignation shall not relieve a member of his obligation to refrain from working during an ongoing strike (Br. 58), does not justify reading a provision into the earlier constitution by implication. Indeed, the fact that the constitution was amended to add the provision is persuasive evidence that it was not there before.

In any event, a constitutional amendment made seven years after the strike here could hardly have apprised the employees of their obligation to the Union at that time.

[10] The Board has not yet had occasion to consider that question, nor did the court below (Pet. App. 20a, n. 20). Cf. *United Auto Workers (John I. Paulding, Inc.)*, 137 NLRB 901, enforcement denied, 320 F. 2d 12 (C.A. 1); *United Auto Workers (General Electric Co.)*, 197 NLRB No. 93, 80 LRRM 1411 (1972). See also *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 197, concurring opinion of White, J.

by its pressures for conformity and submission to its regime" (slip op., p. 5).

Contrary to the Union's contention (Br. 84–85), an important statutory policy is defeated by imposing, by implication, an obligation on a member to adhere to a strike even after he has resigned from the union. As the court below noted (Pet. App. 17a):

> Section 7 of the N.L.R.[A.] expressly protects the right of any employee to refrain from any or all of the concerted activities guaranteed to employees under the Act. * * *

It is well settled that a contract waiver of a statutory right must be "clear and unmistakable"—"a mere inference, no matter how strong, [is] * * * insufficient." *National Labor Relations Board* v. *Perkins Machine Co.*, 326 F. 2d 488, 489 (C.A. 1); accord: *Int'l Telephone & Telegraph Corp.* v. *National Labor Relations Board*, 382 F. 2d 366, 373 (C.A. 3), certiorari denied, 389 U.S. 1039; *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 751 (C.A. 6), certiorari denied, 376 U.S. 971.

It is particularly appropriate that this principle be adhered to here, since the contract between a member and his Union is a "contract of adhesion," *i.e.*, "[t]he member has no choice as to terms but is compelled to adhere to the inflexible ones presented." Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1055 (1951). In view of the lack of negotiation over the terms of contracts of adhesion, where there is doubt as to the meaning of those terms, the doubt is resolved against the party who drafted the terms. 3 Corbin, *Contracts* § 559 (1960); 6A *id.*, § 1376; see generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*,

43 Colum. L. Rev. 629 (1943). Similarly here, where there is no clear indication in the Union's constitution or bylaws that the member has waived his right to refrain from engaging in union activities subsequent to his effective resignation from membership, those documents should not be construed as effecting such a waiver by implication.

Moreover, as the Court recognized in *Granite State*, "[e]vents occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident." Slip op., p. 4. A member should not be deemed to have given up his freedom to protect against these serious hardships unless, at least, there is clear evidence that he knowingly waived that right.

This analysis is not inconsistent with *Int'l Bro. of Boilermakers v. Hardeman*, 401 U.S. 233. This Court there held that "nothing in either the language or the legislative history of § 101(a)(5)" of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411(a)(5)—which provides that no member of a labor organization may be disciplined unless, *inter alia*, he has been "afforded a full and fair hearing"—authorized "a substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members" (401 U.S. at 242–243). The Court's decision was based on the legislative history of that particular provision (*id.* at 243–245), and does not enunciate a general principle that is applicable to

other statutes as well. Moreover, in *Hardeman*, the conduct for which the member was disciplined—*i.e.*, assault on a union official—was not otherwise protected by statute; the only issue was whether it was proscribed by the Union's regulations. It is one thing to give the Union wide latitude to interpret its regulations in the latter situation; it is quite another matter to give it such authority where, as here, its interpretation affects an employee's Section 7 rights.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it sustains the Board's holding that the Union violated Section 8(b)(1)(A) of the Act by imposing court-collectible fines on employees who resigned from the Union for work done after such resignation.

Respectfully submitted.

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MARCH 1973.

U.S. GOVERNMENT PRINTING OFFICE : 1973

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY

No. 71-1607

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

THE BOEING COMPANY AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE BOEING COMPANY

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 459 F.2d 1143 (Pet. App. 5a-33a).[1] The opinion of the National Labor Relations Board is reported at 185 NLRB No. 23 (Pet. App. 34a-46a). The decision of the Labor Board's Trial Examiner is reproduced at A. 2-47. A companion opinion of the National Labor Relations Board is reported as *International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 504 (Arrow Development Co.) and David O'Reilly, An Individual*, 185 NLRB No. 22 (Pet. App. 47a-67a).[2]

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1972 (Pet. App. 1a-3a). Petitions for writs of certiorari were granted on December 18, 1972 (A. 205-6).

QUESTIONS PRESENTED

1. If a union is not precluded by Section 7 of the National Labor Relations Act from fining its members for crossing a picket line, the reasonableness of the

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[1] "Pet. App." refers to the petition for a writ of certiorari of Booster Lodge No. 405 (i.e., the Union) in No. 71-1417. "A" refers to the separate appendix to the briefs.

[2] Remanded to Board, *sub nom., David O'Reilly v. N.L.R.B.*, ____ F.2d ____, 82 LRRM 2073 (C.A. 9, 1972), requiring that the Board determine the reasonableness of a fine. The reasoning in support of the remand is expressed in *Morton Salt Co. v. N.L.R.B.*, ____ F.2d ____, 82 LRRM 2066 (C.A. 9, 1972).

amount of the fine is a matter to be determined by the National Labor Relations Board.[3]

2. Whether, given a union constitution which prohibits a member from "[a]ccepting employment where a strike ... exists," a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation.[4]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

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[3]This question was stated in different form by each petitioner. In No. 71-1417, the Union stated the question as follows: "Whether the National Labor Relations Board is empowered to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking." In No. 71-1607, the Board presented the question as follows: "Whether the National Labor Relations Board, in determining whether a union committed an unfair labor practice by assessing and seeking court collection of a fine against a member for violating a union rule against strikebreaking, is required to determine whether the fine is reasonable in amount."

[4]The quesion here is as stated in the Petitioning Union's brief, page 2.

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

* * * *

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.

STATEMENT

I. The Strike, The Fines And The Board's Findings Of Fact

The Boeing Company operates a plant at New Orleans, Louisiana, known as the Michoud plant (A. 3). The production and maintenance employees at this plant are represented by the Union and its parent, International Association of Machinists and Aerospace Workers, AFL-CIO. It is estimated that in September, 1965, approximately 6,000 employees were employed at Michoud, of which approximately 1500 to 1900 employees were in the unit represented by the Union (A. 3-4). A contract between the Union and The Boeing

Company was in effect from May, 1963 to September 5, 1965. The contract provided that unit employees who are members of the Union or who become members are required to maintain their membership as a condition of employment. Employees hired after the effective date of the contract who are not members of the Union have a specified period in which to give notice that they do not desire to become members of the Union. (A. 3-4).

Upon the expiration of the contract on September 5, 1965, the Union struck and picketed Boeing at Michoud and other locations. The strike ended on October , 1965, and a new contract was entered into. During the strike, certain employees who were in the contract unit at Michoud crossed the picket line and worked. Some of these employees resigned from the Union prior to returning to work. Another group of those members who returned to work during the strike made no effort to resign from the Union. Others resigned during the course of the strike, but returned to work before submitting their resignations. All resignations, however, were submitted after the expiration of the 1963-65 contract and before the signing of the new one, and all were submitted prior to the imposition of disciplinary actions by the Union. A. 4; Pet. App. 36a.

In late October or early November, 1965, the Union notified all employees who returned to work during the strike that charges had been preferred against them under the International Constitution for "Improper Conduct of a Member" in "accepting employment ... in an establishment where a strike ... exists."

Employees were advised of the dates of their trials, which were to be held even in their absence. Prior to the strike, the Union had not notified or warned members about the possible imposition of disciplinary measures. In fact, the Union had never before imposed disciplinary fines on any of the members for any reason. A. 4-5; Pet. App. 36a.

Fines were imposed on all employees who had returned to work during the strike, regardless of whether, or when, they had resigned from the Union. Those employees who did not appear at their trial were fined $450; those who appeared and were found guilty were also fined $450.[5] The fines of about thirty-five employees who appeared for trial, apologized and plead loyalty to the Union were reduced to fifty percent of the earnings they received during the strike. The Union sent out written notices to the fined employees that the matter had been referred to an attorney for collection, that suit would be filed if the fines remained unpaid, and that reduced fines would be reinstated to $450 in the event of nonpayment. The Union filed suit against at least nine employees to collect the fines (plus attorney's fees and interest). For instance, a citation dated April 11, 1966, shows the amount as $630 "with legal interest." The amount of $630 was based upon the $450 fine, plus $180 attorney's fees. A. 6-7; A. 134-5; Pet. App. 8a-9a.

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[5]There is no evidence that anyone was found not guilty. The disciplined employees were also barred from holding office for a period of five years. A. 6, ftn. 2.

On February 18, 1966, the Company filed a charge with the National Labor Relations Board, alleging that the Union had violated Section 8(b)(1) of the Act, and a complaint was issued by the Board's General Counsel. Pet. App. 9a-10a. The complaint alleged that the fines were unreasonable, excessive, and discriminatory. It further alleged that the Union levied fines against certain employees who had resigned from the Union prior to working during the strike and prior to being fined, and these fines were also alleged to be unreasonable, excessive, and discriminatory. A. 2.

A request was made to the Company by the Union that the employment of certain of the fined employees be terminated, and it was not until January 8, 1968, that the Union withdrew its request. A. 201-4. Additionally, on October 13, 1965, the Union published and issued to all employees its house organ, "The Space Travelers," wherein the Union stated that its mailing list is accurate and up-to-date for members only, and instructed the members to "pass your paper on to 'someone listed' and 'you know who,' so that they will know that WE KNOW." The reference to 'someone listed' is to two pages of names of employees who allegedly "crossed the picket line and/or wrote letters of termination of their membership" during the strike. The names appear under the following heading:

WE SHALL NOT FORGET!!

Also on page one, over the signature of the Union's Business Representative, the employees were told:

THE 10% WHO WORKED BEHIND THE LINES, COMMONLY CALLED SCABS, MUST HAVE A GUILTY CONSCIENCE TO ACCEPT THE GAINS WON BY OTHERS.[6]

The record shows that the Michoud plant was severely damaged by Hurricane Betsy and was closed for three or four days, reopening just a matter of a few days before the strike. Employees who worked during the strike were deprived of the benefits of the Union's hurricane relief fund.[7] A. 19-20. By letter or otherwise, there was no notification to the employees by the Union that it had reduced or would reduce the fines to fifty percent of earnings under some circumstances. A. 6. This alleged policy purportedly was instituted in the "first part" of 1966. *Ibid.*, n. 3.

The employees involved in the instant case normally earned approximately $2.38 to $3.63 per hour, which would mean a gross earning of approximately $95 and $145 per 40-hour week, respectively. A. 18.

At the time of the 1965 strike, the Union's Constitution and By-Laws contained no provisions for voluntary resignations from membership. It was the Union's position that the resignations were an exercise in futility and it regarded them as having no effect. A. 11. Ac-

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[6] A. 192-200.

[7] The Trial Examiner discredited Business Representative Higgins' claim that the Union did take the hurricane situation into consideration regarding the fines. A. 6-7.

cording to the Union, by action which postdated the events in this case, the International Constitution has been amended to provide that resignation shall not relieve a member of his obligation to refrain from accepting employment during a strike if the resignation occurs within the period of the strike or within 14 days preceding its commencement. Union's brief, page 58. But the contract between the Union and the employer binds the member to membership for the duration thereof. A. 154-8.

II. The Board's Decision And Order

The Union was alleged to have violated Section 8(b)(1)(A) of the Act by (1) fining its members an unreasonable and excessive amount for violation of the Union's rule against working for a struck employer and threatening to and initiating court action to collect same, and (2) fining in any amount those persons who had resigned from the Union for their activities subsequent to their resignation. A.2. The Labor Board's Trial Examiner sustained these allegations, and concluded that the fines levied against those employees who had been resigned from the Union were unreasonable. A. 43-47. The Trial Examiner devoted a considerable portion of his decision discussing how "reasonableness" should, in his opinion, be determined. A. 15-42.

The Board found that the Union's imposition of disciplinary fines upon individuals who had resigned from the Union before engaging in the conduct for which

the discipline was imposed violated Section 8(b)(1)(A) of the Act, regardless of the amount of the fine. Pet. App. 37a *et seq.*[8] The Board further found that the Union did not violate the Act by imposing disciplinary fines upon members who did not resign but worked during the strike, and that the Union did not violate the Act by fining former members for returning to work prior to their resignations, but that the imposition of discipline for conduct engaged in after their resignations was illegal. Pet. App. 42a-43a. The Board ordered the Union to cease and refrain from the conduct which it found to be violative of the Act, and to reimburse or refund to any employees who have paid fines levied against them for any conduct which occurred subsequent to their resignations. With regard to those employees who returned to work before resigning but who subsequently resigned, the Union was ordered to remit a prorata portion of the fine, so that what remained reflected only preresignation conduct. Pet. App. 43a-44a.

A majority of the Board found that the legality of the fines does not depend on their reasonableness, and did not adopt the Trial Examiner's findings, conclusions and recommendations on that issue. Chairman McCulloch dissented in this regard; he would examine the amount of the fines to determine their reasonableness in those situations where the Union's imposition thereof and threatened or actual court action to collect

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[8]Member Brown dissented with regard to this finding. Pet. App. 45a-46a.

such fines would in all other respects be lawful. (Where expulsion from membership is clearly the only available method of enforcement, he would consider the size of the fine irrelevant). Pet. App. 42a, n. 16. In so holding, the Board relied upon *Arrow Development Corp.*, 185 NLRB No. 22,[9] issued on the same day as the decision and order in the instant case. *Ibid.* In that case, the majority concluded that Congress did not intend to have the Board regulate the size of fines and establish standards with respect to their reasonableness. Pet. App. 55a, *et seq.* Chairman McCulloch's full dissent is at Pet. App. 58a-67a.

In two cases, the United States Court of Appeals for the Ninth Circuit has reversed the Board majority on this question, and it has remanded those cases to the Board. *David O'Reilly v. N.L.R.B., supra; Morton Salt Co. v. N.L.R.B., supra.*[10]

III. The Decision Of The Court Of Appeals

The Court of Appeals for the District of Columbia Circuit agreed with the Board that the Union acted within the sphere of its lawful authority in imposing fines on the members who did not resign from the Union before returning to work (Pet. App. 13a), that the Union did not violate Section 8(b)(1)(A) so far as its

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[9] *International Association of Machinists And Aerospace Workers, AFL-CIO (Arrow Development Co. and David O'Reilly, An Individual)*, Case No. 20-CB-1947. Pet. App. 47a, et seq. See footnote 2, *supra*.

[10] See footnote 2, *supra*.

imposition of disciplinary fines concerned the pre-resignation conduct of those employees who returned to work and then resigned (Pet. App. 15a), and that the Union violated the Act by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' post-resignation conduct in working during the strike (Pet. App. 21a).

The Court unanimously refused to accept the Board's majority conclusion that Congress did not intend to empower the Board with the authority to examine the severity of Union discipline when ascertaining its legality, and remanded the case to the Board for further proceedings. Pet. App. 22a-23a. In so doing, the Court stated (Pet. App. 25a):

> Since the imposition of an unreasonably excessive fine is violative of Section 8(b)(1)(A), it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised. * * *

The Court proceeded to set forth reasons why the Labor Board should determine the question of reasonableness, and enumerated a number of factors which it felt the Board could and should consider in resolving the question. Pet. App. 26a-30a.

SUMMARY OF ARGUMENT

I.

The Court of Appeals, in agreement with the Board, correctly affirmed the conclusion that "the Union violated Section 8(b)(1)(A) by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage." The imposition of fines under such circumstances was held to violate the policies underlying the National Labor Relations Act and has effects outside the area of internal union affairs, and therefore they are clearly coercive within the meaning of Section 8(b)(1)(A).[11]

It is only by virtue of the membership relationship that the union has any authority over the employee-member. Thus, when the membership relationship ceases to exist, so does the union's authority to take disciplinary actions. The sanctions allowed by the Court in *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), were against those who enjoyed full union membership. Even then, for the union's rule to be valid and enforceable, the members must be free to leave the union and escape the rule. *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969)

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[11]Pet. App. 21a.

The employees here had no obligation to continue their membership in the Union when the 1963-65 contract expired. Pet. App. 20a-21a. Thus, having relinquished their membership, they were free to "refrain from engaging in any and all concerted activities," including observance of the Union's picket line. See Section 7 of the Act, page 3, *supra*.

Contrary to the Union's assertion, there is no continued duty, implied or otherwise, on the former member to refrain from returning to work subsequent to his resignation. The Union would have the Court supply a contractual or other obligation where none exists. All resignations in question here were submitted after the expiration of the 1963-65 contract, and before the execution of the new agreement, and all were submitted prior to the imposition of any Union discipline, or threats or warnings. Pet. App. 7a. The Union's Constitution and By-Laws make no reference to resignations.

The subsequent insertion into the Union's Constitution of a provision purportedly prohibiting members from accepting employment at the struck establishment,[12] effective over seven years after the Michoud strike had ended, can have no effect here. Heretofore, the Constitution was silent with regard to resignations and the Union took the position that its members could not resign, except "by death." Moreover, the newly-added provision contravenes the pur-

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[12]Union's brief, page 58.

poses and policies of the Act, particularly Section 7 thereof, for, as a practical matter (considering the union security language of the contract), this provision will prevent any employee from being able to resign at *any* time, including during strike situations. Events occuring after a strike is called may have the effect, moreover, of changing conditions in such a manner that even if the employee were bound initially to join in the strike he should no longer be so bound. Additionally, it has the effect of "locking in" members who may not wish to strike at all, and prohibiting them from resigning from the union and exercising their rights under Section 7 of the Act.

The decisions of this Court demonstrate that in applying Section 8(b)(1)(A), the Board is required to make an accommodation between the right of a union to protect against erosion of its status as exclusive bargaining representative through reasonable discipline of members who violate valid rules governing membership, and the right of employees, conferred by Section 7, to refrain from engaging in union activity. They further indicate that the union's right of discipline flows from the fact that, in joining the union, the member agrees to abide by lawful union rules and policies, and that a member may escape the discipline by leaving the union.

The very fact that a worker gives up so much freedom of action in joining a union supports the conclusion that he must ultimately have the right to leave the union if he finds some aspect of its regulations intolerable. The Board was reasonable and correct in con-

cluding that the members had a right to resign from the Union and that the Union's right of discipline was coterminous with the union-member relationship.

The contention of the Union[13] and of the AFL-CIO[14] that because of the Union's prohibition against members working for a struck employer the members have thus by specific commitment mutually promised each other to refrain from strikebreaking, notwithstanding resignations, is not tenable, and contrary to the provisions of Section 7 of the Act and to this Court's decisions. See *Scofield, supra*, page 13 and *Granite State, infra*, page 20. The qualification of Section 7 rights sought by the Union and the AFL-CIO would seriously curtail employees' Section 7 rights to refrain from engaging in union activity. Even where a member's support of any rule or policy, such as increased dues or assessments, may actually be shown, such support may be viewed as a waiver of any right to oppose the rule, but it can hardly be viewed as a commitment to remain a member or support the rule (e.g., pay dues) after he has resigned. Support at one time of a particular union project may not be construed in derogation of Section 7 rights, so as to commit a member irrevocably to union membership or to support of a union rule once he has left the union.

Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct.

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[13]Union's brief, pages 58-59.

[14]Amicus curiae brief, pages 16-17.

II.

The Board contends that it has no authority to determine the reasonableness of an otherwise lawfully imposed fine by a union upon its members. It also argues that Section 8(b)(1)(A) of the Act does not *require* the Board to determine whether a judicially enforceable union fine imposed upon a member for breach of a valid union rule is reasonable in amount.[15]

Contrary to the contentions of the Board, the Union and the AFL-CIO,[16] in order for an otherwise valid union fine to be legal under Section 8(b)(1)(A), it must be reasonable in amount or size, and the Labor Board not only is empowered to determine the question of reasonableness, but it is the proper forum for doing so.

The Court of Appeals for the District of Columbia Circuit specifically stated that the Board's belief that it does not have the obligation of examining the reasonableness of union fines in Section 8(b)(1)(A) proceedings is based upon a clear misconception of the law and the Supreme Court's relevant decisions. Pet. App. 23a. The decisions of the Supreme Court, in *Allis-Chalmers*, and *Scofield*, *supra*, make it clear that the reasonableness of the fine must be determined before the legality of the fine, under Section 8(b)(1)(A), can be determined.

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[15]Board's brief in No. 71-1607, page 8.
[16]Amicus Curiae brief, page 2, et seq.

The position of the Board on this question is inconsistent with the preemption doctrine. See *San Diego Building Trades Council v. Garmon, infra* at page 41. As the court below noted, the possible existence of a concurrent state court remedy does not relieve the Board of its duty to adjudicate the remedy of unfair labor practices under the Act. The state courts are reluctant to become embroiled in such matters, and there is a compelling need for national uniformity and guidance in such matters. Pet. App. 25a-27a. Moreover, the Board is not without expertise in related areas. It has long been called upon, under Section 8(b)(5) of the Act, to determine whether initiation fees required by a labor organization are excessive. See *Radio & Studio Employees Union, infra*, at page 40. The fact that Section 8(b)(1)(A) does not provide the Board with specific standards to be applied in determining the reasonableness of a union fine, while Section 8(b)(5) does include some express standards, does not detract from the Board's authority and responsibility under Section 8(b)(1)(A). "Experience and common sense will supply the grounds for the performance of this job." *N.L.R.B. v. Radio and Television Engineers Union, infra*, page 39.[17]

A fine imposed for the violation of a union rule should be viewed with close scrutiny. Such fines should be permitted only when needed for protection of legitimate union interests. If the amount of the fine is in-

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[17]364 U.S. at 583.

ordinately disproportionate to the needed protection, an inference is warranted that the fine was imposed upon the member, not in vindication of a legitimate union interest, but rather as a reprisal for having exercised a statutorily protected right. Pet. App. 29a.

The Board's contention that for it to determine the reasonableness of the amount or size of union imposed fines would require it to protrude itself into the internal affairs of a union which was not contemplated by Congress either in the Taft-Hartley Act or in the Labor-Management Reporting and Disclosure Act not only is without merit but it is contrary to the Board's own decisions. The Board has stated that the Department of Labor is directly responsible for the administration of the Labor-Management Reporting and Disclosure Act, but that in determining the legality of union fines, the Board is charged with "considering the full panoply of congressional labor policies.'" *Carpenters Local Union No. 22 (Graziano Construction Company)*, 195 NLRB No. 5, 79 LRRM 1194 (1972)). In that case, the Board recognized and decided that a union may not, under the guise of enforcing internal discipline, deprive members of rights guaranteed under the Labor-Management Reporting and Disclosure Act to participate fully and freely in the internal affairs of their union.

It is the Board, and not the state courts, which has been entrusted to determine the true motivation of employers and unions alike in taking disciplinary actions against employees. The Board has developed that par-

ticular expertise in resolving issues under Sections 8(a)(3) and 8(b)(2) of the Act. The same expertise should be applied in determining the reasonableness of otherwise valid union fines.

ARGUMENT

I. A Union Violates Section 8(b)(1)(A) Of The National Labor Relations Act By Fining Employees Who Resigned From Union Membership And Returned To Work During A Lawful Union-Authorized Strike, And By Seeking Judicial Enforcement Of The Fines.

In *N.L.R.B. v. Granite State Joint Board, Textile Workers Union of America, AFL-CIO,* 93 S.Ct. 385 (1972), the Court held that, where neither the contract nor the Union's constitution or by-laws contained any provision defining or limiting the circumstances under which a member could resign, a member is free to resign from his union during the course of a strike and then return to work without incurring the liability of a court-collectible fine imposed by the union to discipline him for his post-resignation return to work. The Court did not consider an initial membership vote to strike, or a later membership resolution subjecting any member aiding or abetting the employer during the strike to a $2,000 fine, to suffice as a restriction on resignation.

As the Union points out,[18] the Court did state, "We

[18]Union's brief, page 57.

do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign. But where, as here, there are no restraints on the resignation of members, we conclude that the vitality of Section 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his Section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." (93 S.Ct., at 387; footnote omitted).

Contrary to the Union's assertion, however, the question purportedly reserved in *Granite State* is *not* presented in this case. Here, the Union's constitution and by-laws made no provision for resignation from membership, and the resignations were submitted subsequent to the expiration of the old collective bargaining agreement and prior to the execution of the new one, and prior to any disciplinary action being taken or threats of same by the Union.

A. Joining the Issue

The Board holds, with court approval, that in the absence of an explicit contrary restriction upon the effect of resignation, a member's resignation from his union in the midst of a strike frees him from any obligation he may have had to refrain from returning to work during the strike, after his resignation. The Board reasoned that in joining a union, the individual member becomes a party to a contract-constitution, and in so doing, without waiving his Section 7 right to refrain from concerted activities, he consents to the

possible imposition of union discipline upon his exercise of that right. But, the Board reasons, "(T)he contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for that duty are extinguished." Pet. App. 39a-40a.

The Union contends, however, that the issue before the Court is the interpretation of the *post resignation* breach of a union rule against working for a struck employer.[19] The question here is no different from the one submitted to the Court in *Granite State, supra;* i.e., "Whether a union violates Section 8(b)(1)(A) of the National Labor Relations Act by fining employees who resigned from union membership and then returned to work during a lawful union-authorized strike, and by seeking judicial enforcement of the fines."[20]

B. The Decisions Of The Courts Make It Clear That Members Are Free To Resign From A Union And Escape The Imposition Of Union Discipline For Post-Resignation Conduct.

We submit that the jurisprudence supports the opinions of the Board and the Court of Appeals for the

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[19]Union's brief, page 62.

[20]N.L.R.B. petition for writ of certiorari, *N.L.R.B. v. Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, October Term, 1971, No. 71-711, at page 2.

District of Columbia Circuit that, absent possible other considerations not present here, employee-members are free to resign from a union and escape imposition of union discipline for their post-resignation conduct. In such situations, the "internal affairs" of a union are no longer involved, and unions may not, by their constitutions or otherwise, infringe upon the Section 7 rights of the employees.

Local 1255, International Association of Machinists And Aerospace Workers, AFL-CIO v. N.L.R.B., 456 F.2d 1214, C.A. 5, 1972, is not to the contrary. There, the court merely held that a union member who resigns during a strike and crosses his union's picket line to return to work may be fined by the union for his post resignation strikebreaking, when the fine is enforceable only by explusion from the union. More accurately, the Court held that the "thrust of the penalty was to recondition readmission to membership on the payment of the fine,"[21] a matter reserved to the union under the proviso of Section 8(b)(1)(A).

The Court's decision in *Allis-Chalmers Mfg. Co., supra*, does not support the Union's position. To the contrary, there the Court was not presented with the issue of resignations. In the decisions of the Board and of the Court of Appeals for the District of Columbia Circuit, the Union's right to fine a member for crossing a picket line was recognized, but it was held that the union's right to do so is extinguished by the member's effective resignation from the union before crossing the picket line.

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[21]456 F.2d at 1217.

In the *Scofield* case, *supra*, the Court held that a union did not violate Section 8(b)(1)(A) by fining employees who exceeded a production quota established by union rule and acquiesced in by the employer. The Court reasoned that "Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule.*" 394 U.S. at 430; emphasis supplied.[22]

These decisions make clear that, in applying Section 8(b)(1)(A), the Board is required to make an accomodation between the right of a union "to protection against erosion of its status [as exclusive bargaining representative] through reasonable discipline of members who violate rules and regulations governing membership" (*Allis-Chalmers, supra*, 388 U.S. at 181), and the right of employees, conferred by Section 7, "to refrain from" engaging in union activity. They further indicate that the union's right of discipline flows from the fact that, in joining the union, the member agrees to abide by lawful union rules and policies, and that a member may escape the discipline by leaving the union.

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[22]The Court added: "If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change that Rule, then he may leave the union and obtain whatever benefits in job advancements and extra pay may result from extra work, at the same time enjoying the protection from competition, the high piece rate, and the job security which compliance with the union rule by union members tends to provide." 394 U.S. at 435.

The very fact that a worker gives up so much freedom of action by joining a union (*Allis-Chalmers, supra*, 388 U.S. at 180) supports the conclusion of *Scofield, supra*, that he must ultimately have the right to leave the union if he finds some aspect of its regulations intolerable. In this case, as in *Granite State Joint Board, supra*, the union's constitution and by-laws contained no restriction on members' rights to resign and the retention of membership provision of the collective bargaining agreement had expired with the agreement.

The Board correctly noted (Pet. App. 40a):

> The holding in *Allis-Chalmers* was carefully restricted to the facts of that case. The Court expressly refused to pass on the legality of the imposition of a fine upon 'limited members' of the Union. It appears to us that in this reservation there is implication that such a fine when levied against non-members constitutes a form of restraint and coercion proscribed by Section 8(b)(1)(A). The decisions in two subsequent cases reinforce that implication. (Footnotes omitted).

No employee is subject to union rules if he chooses to forego the privileges and duties of union membership. Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Rev. 187, 190 (1969). As stated by the Court of Appeals below (Pet. App. 15a, n. 10):

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> Since unions are only authorized to impose discipline where legitimate *internal affairs* are concerned (citations omitted), it is clear that any effort to fine nonmembers would constitute an attempt to affect *external activities*, an area in which Congress did not intend to permit such union regulation.

The Court's opinion in *Granite State, supra*, disposes of any issue here. There, the Court expressly stated (93 S.Ct., at 387):

> The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. *That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.* (Emphasis supplied).

It appears that the foregoing language, after comparing the facts in *Granite State* and the facts in the instant case, squarely disposes of the second question presented by the Union in No. 71-1417. The arguments of the Union in its brief (p. 57 *et seq*) to the contrary merely beg the issue, rather than join it. The question assertedly reserved in *Granite State* is not presented in this case. Here, neither the contract nor the Union's

constitution nor its by-laws defined or limited the circumstances under which a member could resign. In fact, it was the position of the Union that its members could resign only "by death." A. 11 Moreover, in *Granite State*, there was evidence that all of the resigning members against whom fines had been levied had participated in the vote to strike (93 S.Ct., at 387); no such evidence is present in the subject case.[23]

In its amicus curiae brief, even the AFL-CIO takes the position that the Board is empowered to preclude discipline of non-members (AFL-CIO brief, pages 7-8). The AFL-CIO states (Brief, page 8):

> ... Section 8(b)(1)(A), as it has been interpreted thus far, interdicts 'external' means of enforcement, measures union rules against external standards embodied in the NLRA, *and prohibits the imposition of union sanctions against non-members, i.e., individuals external to the organization.* (Emphasis supplied).

Moreover, since the collective bargaining agreement here provided that once an employee becomes a member he retains his membership only for the life of the contract term (Pet. App. 7a), it may well be argued that resignations were not necessary and that any membership obligations which may have existed were extinguished upon the expiration of the collective bar-

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[23]Cf. concurring opinion of the Chief Justice, 93 S.Ct. at 388.

gaining agreement. Accordingly, the decision of the Board and the Court below, that the employee-members were free to resign and escape the imposition of union discipline for post-resignation conduct, is reasonable and correct.

C. There Are No Facts Present Here Which Permit The Union To Discipline Former Members For Their Post-Resignation Conduct, And The Union May Not Now Impose Requirements Which Subject Employees To Union Discipline For Their Post-Resignation Activities.

1. The *Granite State* case, *supra*, p. 20, presented the court with an excellent opportunity to conclude that notwithstanding the absence of a provision in the union's constitution and by-laws or in the collective bargaining agreement regulating the rights of members to resign their membership, there were other considerations and factors present which deprived members of their right to do so. In fact, the Court of Appeals for the First Circuit had so held. Nevertheless, the Court held to the proposition that where there were no such provisions, members were free to resign at will and that the union no longer had any right to attempt to impose disciplinary fines upon them.

2. No factors to the contrary are present here. Moreover, a union may not, by constitutional amendments or otherwise, abridge the Section 7 rights of employee members to resign and to refrain from engag-

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ing in concerted activities, including prohibiting the employee from resigning his membership and returning to work during a strike. Regardless of any provisions which a union may attempt to impose, employees may continue to resign their membership and remain free from union disciplinary action, such as fines, for exercising their statutory rights.

3. The Union here would have the Court read into the restrictions as they existed in 1965 other obligations purportedly imposed on its members by constitutional amendments in 1972, effective January 1, 1973.[24] However, the purported amendment is patently invalid and illegal, regardless of when it was adopted; even if it were not, it could not be applied retroactively.

The facts demonstrate that if the purported amendment were to be given effect, it would, as a practical matter, deprive employee-members of the right to resign from the Union at any time, because (a) the amendment binds him to the union rules *during* a strike and (b) he is bound to membership during the life of the contract. A. 154-8. According to the Union's argument, at no time could a member resign until the strike ended following the 1963-65 agreement, and he could not do so even then because the new contract did not provide him with the opportunity to escape the future obligations of membership.

A Union may not, under the guise of prescribing "its own rules with respect to the acquisition or retention

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[24]Union's brief, pages 58-59.

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of membership therein,"[25] contravene either the express provisions or the purposes of the Act by denying to employees the right to refrain from union membership or from other protected or concerted activities.

4. Once a member has effectively resigned, the union may not discipline him for his post-resignation conduct by attempting to impose fines upon him and attempting or threatening to collect those fines, or by any other means of discipline. ". . .(W)hen a member lawfully resigns from the union, its power over him ends." *Granite State Joint Board, supra*, p. 20 (93 S.Ct., at 386).

II. The Board Is Empowered And Required To Determine The Reasonableness Of A Fine Imposed Upon A Member By A Union For Accepting Work During A Strike In Breach Of A Valid Union Rule, And It Must Do So If The Fine Is To Be Collectible.

In *Allis-Chalmers Mfg. Co., supra*, p. 13, a majority of the Court ruled that a union can, without violating Section 8(b)(1)(A) of the Act, obtain judicial enforcement of *reasonable* fines against its members who crossed a picket line in violation of a valid union rule. Subsequently, the Court stressed the implication of *Allis-Chalmers* that a disenchanted member may resign to avoid any rule he considers against his best interest. *Scofield, supra*, page 13. On December 18, 1972, in No. 71-1563; *The Boeing Company v. National Labor*

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[25]Section 8(b)(1)(A).

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Relations Board and Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, ___ U.S. ___, the Court declined to reverse its decision in *Allis-Chalmers, supra*, holding that members may escape the disciplinary fines of a union by resigning from it, but those who remain members are subject to *reasonable* fines for violation of valid union rules. The Board is the proper forum for determining the question of reasonableness. The Court below,[26] and Court of Appeals for the Ninth Circuit[27] agree.

A. In Order For An Otherwise Legal Fine To Be Enforceable, The Amount Of The Fine Must Be Reasonable.

In *Allis-Chalmers*, the Court stated (388 U.S. at 183):

> It is no answer that the proviso to Section 8(b)(1)(A) preserves to the Union the power to expel the offending member. Where the Union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty than a *reasonable fine*. (Emphasis added).

The Court further recognized that "the proviso preserves the right of unions to impose fines, *as a lesser penalty than expulsion* ..." 388 U.S. at 191-2 (Empha-

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[26]Pet. App. 23a-25a.
[27]See ftn. 2, *supra*.

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sis supplied).[28] This implicitly recognized that, for a disciplinary fine to be less coercive than expulsion from the union, the fine imposed must be a *reasonable* one, for it is intuitively obvious that enforcement of a grossly excessive fine might visit a far greater burden upon an individual than would expulsion.[29]

In reaching its decision, the Court evaluated the position of unions as the bargaining representative of collective bodies of workers and their needs in this position, and weighed these considerations against the challenge to *any* interference with employees' Section 7 rights. The Court found that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ."[30] From an appreciation of the inter-

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[28]Mr. Justice White, in his concurring opinion, observed:

> [S]ince expulsion would in many cases — certainly in this one involving a strong union — be a far more coercive technique for enforcing a union rule and for collecting a *reasonable fine* than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of Section 7 rights, nevertheless intended to bar enforcement by another method [court action] which may be far less coercive.

388 U.S. at 198 (emphasis supplied). It is also informative to note the express interpretation given to the *Allis-Chalmers* opinion by the dissenting members of the Court: [T]he Court's holding boils down to this: a court-enforced *reasonable fine* for nonparticipation in a strike does not 'restrain or coerce' an employee in the exercise of his right not to participate in the strike.' 388 U.S. at 200-201 (dissenting opinion of Black, J.) (emphasis supplied).

[29]See Pet. App. 24a-25a.

[30]388 U.S. 175, 180, quoting *Steele v. Louisville and N.R. Company*, 323 U.S. 192, 202.

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play of the Section 7 right to refrain from collective activity and the Section 8(b)(1)(A) prohibition on union interference with this right, as well as the legislative history of Section 8(b)(1)(A), the Court concluded that the "imprecise"[31] terminology, "restrain or coerce," of Section 8(b)(1)(A) was not meant to prohibit absolutely union imposition of fines. Rather, the Court held that *reasonable fines* are not a type of restraint or coercion prohibited by Section 8(b)(1)(A).[32]

The Court's decision in *Allis-Chalmers* thus confirmed the ability of unions to assess *reasonable* fines for strike-breaking, and outlined the interpretative framework in which analysis of union disciplinary action must take place. This reconciliation of the rights and obligations of union members under the Act was refined much further in the *Scofield* case. The issue before the Court there was the legality of union fines assessed against employees who disregarded a union rule setting a ceiling on daily pay for piece work performed for the Wisconsin Motor Corporation.[33] The Court considered the propriety of union fines as a disciplinary device and reaffirmed its *Allis-Chalmers*

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[31]388 U.S. 192, 202.

[32]The Court, in *Allis-Chalmers*, chose to consider the overall scheme of the Act and to balance the needs of labor unions against the assertion of an absolute right of freedom of action on the part of union members. The Court did not adopt the Board's reasoning that the union's action was privileged by the Section 8(b)(1)(A) proviso: "Our conclusion that Section 8(b)(1)(A) does not prohibit the locals' action makes it unnecessary to pass on the Board holding that the proviso protected such actions." 388 U.S., at 192, n. 29.

[33]See the statement of facts set forth by the Trial Examiner in *Wisconsin Motor Corp.*, 145 NLRB 1097 (1964).

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decision that "[a] union rule, duly adopted and *not the arbitrary fiat of a union officer*, forbidding the crossing of a picket line during a strike was therefore enforceable against *voluntary union members* by expulsion or a *reasonable fine*." 394 U.S., at 428 (emphasis added). The Court expressly recognized that the enforcement of a proper union rule "by *reasonable fines* does not constitute the restraint or coercion proscribed by Section 8(b)(1)(A)." 395 U.S., at 436 (emphasis supplied).

The Supreme Court's decisions in *Allis-Chalmers* and *Scofield* established the following standards, each of which must be met if a union's disciplinary action against a member imposed because of the member's exercise of his Section 7 rights is to escape the prohibition of Section 8(b)(1)(A) of the Act:[34]

(1) The fine must be reasonable;
(2) The fine must not be the mere fiat of a union leader;
(3) The members fined must be free to leave the union;
(4) The means used to enforce a rule must be acceptable;
(5) The rule must be supported by a legitimate union interest;
(6) The rule must not violate federal labor law policies.

A negative answer to any of these issues removes the union action from the protection of *Allis-Chalmers* and *Scofield*, and makes it a violation of Section 8(b)

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[34] *Scofield*, 394 U.S., at 430-1.

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(1)(A). The facts here show that the first three standards were not met. The Trial Examiner found that the fines were unreasonable in amount. Union fiat was also present in the treatment of the fined employees; the amount was determined before any hearing and the fine was imposed regardless of a member's knowledge or lack thereof of the rule, notwithstanding the fact that they were not warned in advance that such disciplinary action would or might be taken against them, and the Union had never previously imposed disciplinary fines on any of its members. The Union admits that employees fined were involuntary members because, according to the Union, it is impossible to resign from its membership.

The Court below, after reviewing *Allis-Chalmers* and *Scofield*, concluded (Pet. App. 25a):

> * * * In light of the Court's emphasis on the requirement of 'reasonable fines' if a union is to avoid a violation of the Act in these circumstances, we must conclude that the imposition of an unreasonably large fine, at least where the union threatens or actually attempts court enforcement of the fine, may be coercive and restraining within the meaning of section 8(b)(1)(A).
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> Since the imposition of an unreasonably excessive disciplinary fine is a violation of Section 8(b)(1)(A), *it is clearly the obligation of the National Labor Relations Board to resolve the question where such an issue is appropriately raised.* (Emphasis supplied).

In the *Morton Salt Co.* case, *supra* (82 LRRM at 2066)[35] the Court of Appeals, after reviewing *Allis-Chalmers* and *Scofield,* stated:

> While, again, the issue was not squarely presented to the Supreme Court, we particularly note the adjective 'reasonable' in the above-quoted portion of the [Scofield] opinion used in the context of enforceability and legality of the fine. The corrollary of this Scofield conclusion is that *an unreasonable fine is an unfair labor practice.* (Emphasis supplied; citations omitted).

After citing, with approval, the decision of the Court below herein, the Court of Appeals for the Ninth Circuit said, "We agree that the *lawfulness* of fines imposed depends, in part, *upon the reasonableness of the amount* . . ." 82 LRRM at 2071. (Emphasis supplied). The Trial Examiner who heard the instant case, after reviewing *Allis-Chalmers*[36], stated (A.13):

> We proceed, therefore, on the basis, as indicated by the Court, that under the body of Section 8(b)(1)(A) the fine imposed and enforced or sought to be enforced must be 'reasonable.'

Chairman McCulloch, dissenting in the *O'Reilly* case,[37] noted that the dissenting opinion in *Allis-Chalmers* interprets the Court's holding as limited in its scope to "a court enforced reasonable fine," citing

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[35]See ftn. 2, *supra*
[36]His decision issued before that of the Court in *Scofield.*
[37]See ftn. 2, *supra*; *O'Reilly v. N.L.R.B.*

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388 U.S. at 200. (Pet. App. 60a). He further expressed his dissent as follows (Pet. App. 61a-65a):

> The Court's repeated use of the adjective 'reasonable' in both *Allis-Chalmers* and *Scofield* to describe the fines there in issue cannot be passed over casually as without significance. By its carefully drawn distinction between 'reasonable' and 'unreasonable' fines, the Court, it seems to me, meant not only to define the limits of its holdings in these cases, but also to indicate affirmatively that it regarded court-collectible fines which were unreasonable, either in their nature or size, as not serving a legitimate union interest, and therefore not privileged from the proscription of Section 8(b)(1)(A).

B. The Court Below Properly Remanded The Case To The Board With Directions That The Board Determine The Questions Relating To The Reasonableness Of The Fines Imposed By The Union.

In the decision the Board, relying upon its own decision in *International Association of Machinists And Aerospace Workers, AFL-CIO, Local Lodge No. 504 (Arrow Development Co.), supra*[38] concluded that "the Act does not authorize this Board to evaluate the fairness of union discipline meted out to protect a legitimate union interest." Pet. App. 42a, n. 16. The Court of Appeals for the District of Columbia Circuit, how-

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[38]See ftn. 2, *supra*. Remanded to Board, *sub. nom. O'Reilly v. N.L.R.B.*

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ever, disagreed, and remanded the instant case to the Board for further consideration of the question relating to the reasonableness of fines imposed by the Union. Pet. App. 33a.

The Court below observed (Pet. App. 26a-27a):

> ... (T)he business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not 'affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .' * * * Furthermore, the fact that some state courts might not permit enforcement of excessive fines in a collection action by the union, does not detract from their coerciveness, or need for N.L.R.B. action. * * * (Footnotes and citations omitted).

The Court further stated, after rejecting the Board's "reverse preemption" argument, that it was emphasizing the fact that "(t)he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board," citing *N.L.R.B. v. Truck Drivers Union*, 358 U.S. 87, 96 (1957), and added: "This is the very function which the Board is being asked to perform here."[39]

In *Morton Salt*[40], the Ninth Circuit Court, after agreeing with the District of Columbia Circuit Court, stated

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[39]Pet. App. 28a, n. 34.
[40]See ftn. 2, *supra*.

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that an unreasonable fine is an unfair labor practice, (82 LRRM at 2070):

> A statutory responsibility of the Board is to adjudicate and remedy unfair labor practices. N.L.R.A. Section 10(a); 29 U.S.C. Sec. 160 (a). *We conclude that the determination of reasonableness is for the Board.* (Emphasis supplied).

And at 81 LRRM 2071, the Court stated, "We agree that the lawfulness of fines imposed depends, in part, upon the reasonableness of the amount, *and that the N.L.R.B. is the proper forum for this determination.*" (Emphasis added).

1. The Board's argument that the Act does not "require" it to determine whether a fine imposed on a union member for breach of valid union rule is reasonable in amount does not meet the question presented. The Board advanced the same argument when it took the position that it was not authorized, empowered or required to award assignments of work in jurisdictional dispute cases under Sections 8(b)(4)(D) and 10(k) of the Act. The Supreme Court rejected that position in *N.L.R.B. v. Radio and Television Broadcast Engineers Union*, 364 U.S. 573 (1961), noting that "the Board need not disclaim the power given it for lack of standards."[41] Since that decision, the Board has developed "standards" for making affirmative awards in jurisdictional disputes which it applies uniformly, and which provide parties to such disputes with uniform guidance in the resolution or litigation of same. See, e.g., *IBEW Local 743*, 185 NLRB No. 106,

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[41] 364 U.S. at 583.

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75 LRRM 1164 (1970). The Board's expertise in interpreting Section 8(b)(5) of the Act is also of value to the Board in determining the reasonableness of such fines. The Board has exercised its experience in this area and, fairly recently, concluded that a union violated Section 8(b)(5) by imposing excessive initiation fees which restrained and coerced employees in their right to join a union. In so doing, the Board pointed to such factors as the fee being six times greater than the weekly wage of employees belonging to the union, and that it was twice as large as that of the union's sister local. *Longshoremen, I.L.A. Local 1419*, 186 NLRB No. 94, 75 LRRM 1411 (1970).[42]

Although Congress set forth broad, general prohibitions against illegal secondary activities by unions in Section 8(b)(4) of the Act, it has been the Board itself which has refined and interpreted the prohibitions, and it has been the Board which has established "standards" thereunder for regulating secondary picketing. For instance, the Act itself makes no reference to "common-situs" picketing. Yet, the Board has developed guidelines and standards for such situations.[43]

The court below recognized the fallacies of the Board's contention[44], as did the Board's dissenting member, then Chairman McCulloch. See Pet. App. 65a.

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[42]See also *N.L.R.B. v. Television & Radio Broadcasting Studio Employees*, 315 F.2d 398, C.A. 3, 1963.

[43]See, e.g., *Sailors Union of the Pacific (Moore Dry Dock Co., Inc.)*, 92 NLRB 547 (1950); *Electrical Workers Local 1761 v. N.L.R.B.*, 366 U.S. 667 (1961); *Brewery & Beverage Drivers Local 67 (Washington Coca-Cola Bottling Co.)*, 107 NLRB 299 (1953); and *Electric Workers Local 861 (Plauche Electric Co.*, 135 NLR 250 (1962).

[44]See Pet. App. 23a; 25a; 28a-29a.

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2. The Board's position as stated in *Carpenters, Local 22, supra*, is more in conformity with the congressional and judicial scheme of administration of labor laws and policies than is the position being taken by the Board in the present case; i.e., that it may not pass on the reasonableness of these fines. It was the purpose of Congress in establishing the Board to have *one* agency for the adjudication of issues arising from labor disputes.[45] Only recently, the Supreme Court has reaffirmed the "primary responsibility" of the NLRB for guiding the development of national labor policy.[46] To support the Board's preeminent position in the scheme of national labor policy, the Supreme Court in *San Diego Building Trades Council v. Garmon*,[47] and other cases, set forth the preemption doctrine.

> When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to averted.[48]

In such situations, the "power and duty of primary decision lies with the Board," rather than with one

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[45] *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938); *Amalgamated Utility Workers v. Consolidated Edison of New York*, 309 U.S. 261 (1940).

[46] *N.L.R.B. v. Raytheon Company*, 398 U.S. 25, 28 (1970).

[47] 359 U.S. 236 (1959).

[48] 359 U.S. 236, 245. Accord, *International Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Company*, 397 U.S. 195, 200 (1970).

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or several other tribunals, for the sensible reason that "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."[49] Congressional concern for a coherent national labor policy naturally manifests itself in a corollary interest in "uniform application of its substantive rules [avoiding] diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies."[50]

3. The question of the "reasonableness" of a court-collectible fine is not one relating to the "internal affairs" of a union. The fact, alone, that the Union attempted to impose fines upon employees, and threatened or attempted enforcement of such fines against employees because of their post-resignation conduct, particularly when coupled with the Union's insistence that its members may not resign during the course of a strike and therefore they remained subject to the Union's disciplinary actions, had effects outside the area of internal union affairs, and clearly fall within the purview of the Board in interpreting and applying Section 8(b)(1)(A) of the Act. Pet. App. 21a-22a.

Moreover, inasmuch as the imposition of an *unreasonable* fine is coercive, *per se*, the proviso to Section 8(b)(1)(A) is not applicable. See also Pet. App. 29a-30a.

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[49] *Garner v. Teamsters Union*, 347 U.S. 485, 489, 490-91 (1953).

[50] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243, quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490.

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The contentions of the Board[51] and the Union[52] that the decision of the court below (and those of the Court of Appeals for the Ninth Circuit) would involve the Board in purely internal affairs of the Union ignore the above-mentioned factors, as well as the Board's own decision in *Carpenters Local Union No. 22, supra,* page 19. There, the Board held that a union violated Section 8(b)(1)(A) of the Act when it fined a member for allegedly violating a union rule, where the union, according to the Board, utilized the union rule as pretext because of the fined employee's *intraunion* activities. In so holding, the Board stated, "The policies which the Union's conduct here seeks to frustrate are embodied in the Labor-Management Reporting and Disclosure Act of 1959, rather than specifically in the National Labor Relations Act. This difference does not, however, impel a different conclusion."

After referring to language from the Court's decision in *Scofield,* the Board stated (79 LRRM 1196):

> ... (T)he Board is charged with considering the full panoply of congressional labor policies in determining the legality of a union fine. Here the Union, in the guise of enforcing internal union discipline, has sought to deprive its members of the right, as guaranteed by the Labor-Management Reporting and Disclosure Act, to participate fully and freely in the internal affairs of his own union. A fine for that purpose not only in our opinion fails to reflect

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[51]Board's brief, page 13.
[52]Union's brief, pages 17-19.

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> a legitimate union interest but rather in fact impairs a policy that Congress has imbedded in the labor laws. (Footnote omitted).

Similarly, then, an unreasonably excessive fine for working behind a picket line also "impairs a policy that Congress has imbedded in the labor laws" — the policy expressed in Section 7 of the National Labor Relations Act, guaranteeing employees the right to refrain from concerted activities.

In a footnote in *Carpenters, Local 22, supra*, the Board noted (79 LRRM 1196, n. 5):

> ... We are not unmindful of the fact that the Department of Labor, and not this Agency, is directly charged with the administration of the requirement of the Landrum-Griffin Act. We traditionally respect this differentiation. * * * In this area, however, as we understand it, *we have been specifically charged by the Supreme Court with the duty of determining the overall legitimacy of union interests*, and must therefore take into account *all* Federal policies and not limit ourselves to those embodied in our own Act. (Citations omitted; emphasis supplied).

Therefore, in "determining the overall legitimacy of union interests," it is incumbent upon the Labor Board, and not the state courts, to determine and formulate a body of law as to the reasonableness of union imposed fines.

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C. The Board Is Peculiarly Suited To Recognize And Administer Uniformly Those Factors Determinative Of What Is A "Reasonable" Fine.

The Board, if the decision of the Court below is to be upheld, would have the authority to determine whether the Act is violated by the particular fine imposed by a union. The effect of shifting to other fora, scores of different courts of various shades of jurisdiction, the determination of the reasonableness of fines *legally* imposed, would be to place an undue burden upon individual employees and to create a lack of uniformity of justice in the administration by the courts of an issue which can be affected by so many different tests in so many different parts of the country.

Within the Board's own experience under Section 8(b)(5) of the National Labor Relations Act,[53] we find that the particular facts of a case are to be evaluated, and similar standards applied, in deciding whether an unfair labor practice has been committed.

For example, the Board probably would take into consideration the motivation of the imposition of the fine as well as the amount thereof. See, e.g., *Carpenters, Local 22, supra*. Other factors would include the duration of the strike (see *Granite State Joint Board,*

[53]This Section limits the amount of dues or initiation fees that a union may charge employees. The Board is instructed to look to "all the circumstances" to decide if a given amount is "excessive or discriminatory." The "wages currently paid to the employees effected" are deemed to be relevant to the Board's determination. 29 U.S.C. Section 158(b)(5). See, *TV & Radio Broadcasting Studio Employees, supra*, at footnote 42.

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supra). Other factors might be (a) the employees' personal circumstances, particularly their financial desperation; (b) fines imposed by the union, if any, for similar reasons and under like circumstances; (c) whether the amount of the fine is such as to be inordinately disproportionate to the needed protection; (d) the compensation received while employed during the strike; (e) the level of strike benefits, if any, made available to the striking employees; (f) the availability of less harsh union remedies; (g) whether or not the penalty would "impair the member's status as an employee." Pet. App. 29a-30a. Similarly, the method of the payment of the fine and the time period within which it must be paid could be relevant factors, as well as the manner in which charges were filed and processed which led to the imposition of the fine or other penalty. In assessing the reasonableness of a fine the Board might also consider whether or not other sanctions or punishments were imposed upon those who were fined. In the instant case, for instance, members were barred from holding office in the Union for a period of five years. Still another possible factor in determining the reasonableness of the fine might be whether the employees were informed in advance that they would be violating a union rule if they worked behind a picket line, and whether they were warned in advance that they would be penalized and to what extent or degree.[54]

It is inconceivable that the multiplicity of factors that may be involved in resolving the issue of reason-

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[54]Cf. A. 15, n. 19.

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ableness can be entrusted to the courts, rather than to a single administrative body, without the effects of confusion and inequities.

Also entitled to consideration is the likely effect upon the individual employee, faced with the choices of (a) exercising his rights under the Act or (b) a lawsuit at considerable personal expense in which he resists a substantial union fine. Denied the National Labor Relations Board as the forum for resolving this issue at no expense to him, will his rights under Section 7 be frustrated because he cannot afford an attorney and possible court costs to test the penalty assessed by an affluent union?

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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March, 1973

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner*
v.
NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY — No. 71-1417

NATIONAL LABOR RELATIONS BOARD, *Petitioner*
v.
THE BOEING COMPANY, AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO — No. 71-1607

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

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REPLY BRIEF FOR BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

I. THE RESIGNATION ISSUE

1. *Waiver*: The Board's argument on brief on the resignation issue reduces to a swift syllogism: (a) waiver of a statutory right must be clear and unmis-

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takable; (b) the Union's rule against strikebreaking bars a resigner's postresignation return to work by implication rather than expressly; (c) it therefore does not manifest a clear and unmistakable relinquishment of a statutory right; (d) it is consequently unavailable to the Union to defend against its imposition of a court-collectible fine for strikebreaking (Bd. br. p. 11).

One prime flaw in the argument is that it assumes the premise on which the syllogism rests. It presupposes the existence of a statutory right. Yet the issue to be decided—which the Board still refuses to confront (Bd. br. p. 10 and n. 10)—is whether a union member does have a statutory right to return to work in an existing strike subsequent to his resignation, without incurring the liability of a court-collectible fine, despite a union rule barring such postresignation strikebreaking. *Granite State* decided that a postresignation return-to-work was statutorily protected against the discipline of a court-collectible fine where *no* limiting union rule existed. This case presents the question whether there is a statutory right to return to work subsequent to resignation, free of the discipline of a court-collectible fine, where a union rule barring postresignation strikebreaking does exist. That question must first be answered before any notion of "waiver" can properly enter the analysis. If there is no statutory right, there is nothing to waive. Nothing exists from which to subtract. Only if a statutory right is first found is it relevant to consider waiver of it.

We have shown that a union member does not have a statutory right to return to work in an existing strike subsequent to his resignation, free of the liability of

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court-collectible fine, in the face of a union rule barring postresignation strikebreaking (our brief pp. 84-0). The Board does not address our argument. Indeed, it does not even speak of a statutory right, preferring the waffling invocation of "statutory policy . . ." (Bd. br. p. 11). And it explicitly disclaims a position on a union rule "expressly" limiting postresignation strikebreaking (Bd. br. p. 10 and n. 10), confining itself to a union rule which bars postresignation strikebreaking "by implication . . ." (Bd. br. p. 11). And it would invalidate an implied rule, solely because it is implied, on the ground that there may be no implied waiver of a statutory right. Yet its assertion of a statutory right rests on *ipse dixit* alone, and it studiously avoids meeting our argument that no statutory right exists.

It is time for the Board to stop playing Hamlet without Hamlet. This case cannot be sensibly analyzed without answering the underlying question whether a union member has a statutory right to return to work in an existing strike subsequent to resignation, without incurring the liability of a court-collectible fine, where a union rule bars postresignation strikebreaking. Only after it is first determined whether a statutory right does or does not exist can it be intelligibly ascertained what difference it makes, if any, that the rule is express or implied. To assert that a statutory right is abridged because the rule is implied is either question-begging or circular.

2. *Contract of adhesion*: The Board on brief asserts that a union constitution is a " 'contract of adhesion,' " that doubt as to the prohibitory reach of its terms should therefore be resolved against the union as the

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drafter of the document, and that a union constitutional ban against strikebreaking should accordingly not be interpreted to bar a postresignation return-to-work "by implication" (Bd. br. pp. 11-12). This is a wholly artificial construct which does not withstand any analysis.

(a) The relationship of a member to his union is like that of a citizen to his government, not of a policyholder to an insurance company. The constitution governing the union community, like that governing the body politic, must be ungrudgingly interpreted to achieve the ends for which the members formed their union, not as if it were some lifeless trust indenture. The member and his union are not antithetical; the members are the union; the union is not the enemy. And no individual need subject himself to the obligations of union membership—the duties that the members have chosen to undertake towards each other in furtherance of their common endeavor—unless that is his wish.

(b) We begin with the voluntary undertaking of union obligations.

(*i*) In this case, under the terms of the agreement between the Union and Boeing, every nonmember had "the right to elect to become a member of the Union or to elect not to become a member of the Union . . ." (A. 156). A nonmember was informed that "[m]embership in the Union is a matter of your own free choice . . ." (A. 188). Accordingly, every employee who became a member did so because he wanted union membership.

(*ii*) But even if an agreement between a union and an employer were to require membership of all the

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mployees within the unit, compulsory membership neans only that the employee is obligated to pay union ues and an initiation fee (our brief pp. 34-35, 38, 6). An agreement can commit an employee solely to uch payments. He need not assume any other union bligation. When he chooses to become a full member, ndertaking by that act to enjoy the totality of union enefits and to assume the whole of union obligations, e does so because that is what he wants to do. He is ree to acquire or to forego full union membership as e wishes.

(*iii*) The element of constraint is highly limited ven as to the payment of union dues and initiation ees under an agreement between a union and an em-loyer which requires it. Experience has demonstrated verwhelmingly that employees who choose to be repre-ented by a union also voluntarily pay dues and fees to . When the 1947 amendments to the National Labor elations Act were adopted, the proviso to Section (a)(3) was amended to provide that a union security greement, obligating the employees covered by the greement to pay union dues and initiation fees, could nly be valid "if, following the most recent election eld as provided in Section 9(e) the Board shall have rtified that at least a majority of the employees igible to vote in such election have voted to authorize uch labor organization to make such an agreement ." This requirement was repealed on October 22, 51 (Public Law 189, 82d Cong., 1st Sess.), it having oved "burdensome and unnecessary." *N.L.R.B.* v. *aynor News Co.*, 197 F.2d 719, 724 (C.A. 2, 1952), firmed, 347 U.S. 17 (1954). Its pointlessness was anifest from the results of the union-shop authoriza-on polls conducted by the Board. "During the 4 years

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and 2 months, from 1947 to 1951, in which a union-shop authorization poll was required by the act before a valid union-shop agreement could be made, the Board conducted 46,119 such polls. Negotiation of union-shop agreements was authorized by vote of the employees in 44,795 of these polls. This was 97 percent of those conducted." [1] For the fiscal year ending June 30, 1951, of 1,335,683 valid votes cast in such referendums, 1,164,143, or 87.2% of the employees, voted in favor of the union shop.[2] The same was true of the preceding years. In 1950, of 900,866 valid votes, 89.4% favored the unionship;[3] in 1949, of 1,471,092 valid votes, 93.9% favored the union shop;[4] in 1948, of 1,629,330 valid votes, 94.2% favored the union shop.[5]

This overwhelming demonstration that employees voluntarily favor the adoption of union security agreements should have forever put the quietus to the notion that dues and fees are unwillingly paid. These agreements operate compulsively only as to that small group known as " 'free riders,' *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union. . . ." *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 41 (1954). Such agreements are the means by which a majority of the employees can require a negligible minority to pay their own way. But that the vast majority willingly pays was demonstrated by their willing authorization of a contractual obligation

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[1] 16 NLRB Ann. Rep. 10 (1951).

[2] *Id.* at 306.

[3] 15 NLRB Ann. Rep. 235 (1950).

[4] 14 NLRB Ann. Rep. 172 (1949).

[5] 13 NLRB Ann. Rep. 111 (1948).

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to pay. Actual constraint is thus minimal even in the limited area where it may be lawfully exerted.

(*iv*) Acquisition of full union membership, and the consequent assumption of all union obligations, is therefore the free act of the employee, and even the payment of dues and fees under a union security agreement is in its essence voluntary. Of course any particular employee may join a union for one or more of a wide variety of reasons—self-interest, conviction, tradition, social suasion, accident. But, given his status as a full member, his motivation for acquiring full membership is irrelevant to his obligation to discharge the obligations which go along with it, as this Court explained in *Allis-Chalmers* (388 U.S. at 196):

> The majority *en banc* below nevertheless regarded full membership to be "the result not of individual voluntary choice but of the insertion of [this] union security provision in the contract under which a substantial minority of the employees may have been forced into membership." 358 F.2d, at 660. But the relevant inquiry here is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed the union's picket line. It is clear that the fined employees involved in these cases enjoyed full union membership . . . . Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary.

(*c*) Accordingly, if what the Board on brief means by a contract of adhesion is that employees have no alternative but to join the union, this is simply not so. An employee who is a full member has acquired that

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status because he elected it. But the Board may mean by a contract of adhesion that an employee who chooses to become a full member must take the union constitution as it exists. That is true, but only in the same sense that a person who moves into a new city or state must take the laws of those communities as they exist. This is inherent in the nature of acquiring membership in any existing, ongoing and self-governing institution. Analysis must therefore be much more discriminating to be meaningful.

First, a union constitution is the members' own ordering of their associational relationship. Acting in convention, by referenda, or at union meetings the members democratically determine for themselves how their union shall function to achieve their common end. They have no reason to adopt any rules which are antagonistic to their mutual interest as members. An employee who enters a union becomes therefore a member of a society run by rules congenial to every member's welfare. There is thus no basis for viewing those rules with a hostile eye on the assumption that they are fashioned with a bias adverse to the member. Second, there is no possible way that a worker aspiring to membership can negotiate with a union for a set of rules which suits him personally. This is not due to unequal bargaining power. It stems rather from the inherent communal necessity that the rules shall blanket the entirety of the membership evenhandedly without special exception for any. Third, the union constitution as it exists when the new member joins is not a closed instrument. The new member on an equal footing with the old members has the right to seek to change the existing rules through the democratic channels open to all.

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To call a union constitution a contract of adhesion s therefore terrifyingly inapt. A union constitution as about the same resemblance to an insurance policy s a labor organization has to an insurance company.

(d) But even if it were appropriate to characterize a nion constitution as a contract of adhesion, it does not ollow that a rule against strikebreaking may not ightly be interpreted to bar a postresignation return o work.

(*i*) The Board on brief would have it that implica- ion is forbidden in the interpretation of an adhesion ontract (Bd. br. pp. 11-12). This is a vast over- tatement. The conventional formulation is that, after ll other processes of interpretation have been ex- austed without resolving the meaning of the instru- ent, "the court will adopt that one which is the less avorable in its legal effect to the party who chose the ords." 3 Corbin, Contracts, § 559, p. 262; see also, d. p. 268. It is one of a number of "*secondary* rules" iding interpretation to be invoked if meaning cannot e satisfactorily ascertained through the primary outes. Restatement, Contracts, § 236(d) and Com- ent on Clause (d).

But the Board on brief would convert a secondary nterpretative aid into the dominant determinant of eaning. It would bar a just and reasonable inter- retation, not because that interpretation is not the ir import of the union rule, but just because its eaning was arrived at by implication. No such arren canon exists for the interpretation of any in- rument.

Furthermore, it makes no sense to say of a union con- itution that doubt as to its meaning is to be "resolved

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against the party who drafted the terms" (Bd. br. p. 11). The drafters of the constitution are the members themselves operating through the democratic channels they have formed to give practical effect to their communal wishes. Why should an interpretation of their constitution be preferred which operates more strongly against them? More particularly, why should a rule against strikebreaking be interpreted in favor of the strikebreaker rather than the striker? It is a measure of the sterility of the invocation of a secondary aid to interpretation that the Board on brief does not even bother to ask, much less answer, these questions.

(*ii*) Another consequence of characterizing an instrument as a contract of adhesion is a candid refusal to give effect to a term found to be "unconscionable" or "unreasonable" 3 Corbin, Contracts, § 559, pp. 270-271. We welcome the application of that test. The entire burden of our argument is that it is fair and reasonable to interpret a prohibition against strikebreaking to bar a postresignation return to work. And the Board on brief does not say otherwise. It does not choose to fight on this field.

(*iii*) The sharp dichotomy that the Board on brief would draw between an express term and an implied term does not in truth exist. "Implied Promises are also Express Promises, Found by Process of Interpretation." 3 Corbin, Contracts, § 562, p. 286. An express promise often requires interpretation to ascertain its import. An implied promise may be as commanding in its clarity as any which is express. "An implied promise . . . is . . . a promise implied in fact, a promise that the promisor himself made, but a promise that he did not put into promissory words with sufficient

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clearness to be called an 'express promise.' When a court finds and enforces a promise such as this, it finds it by interpretation of the promisor's words and conduct in the light of the surrounding circumstances. This is the exact process by which the meaning of any contract is determined, whether it be described as an express contract or an implied contract. It is the same whether the contractor expressed his intentions in the form of words, oral or written, or expressed them by conduct wholly non-verbal, or used both forms of expression together. The meaning of his words and acts is found by relating them to the usages of the past; this is interpretation." *Id.*, § 562, pp. 286-288.

(d) The fundamental fallacy of the Board's approach on brief is exposed by its effort to distinguish this Court's decision in *International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233 (1971) (Bd. Br. pp. 12-13). This Court in *Hardeman* repudiated a narrow reading of a union constitution, requiring instead that it be interpreted responsively to its character as a charter of union government, with deference due to the union's own reasonable and fair construction of its rules (our brief pp. 70-71, 82).

But, says the Board on brief (pp. 12-13), *Hardeman* is confined to the Labor-Management Reporting and Disclosure Act, "does not enunciate a general principle that is applicable to other statutes as well", dealt with the statutorily unprotected activity of assaulting a union official, and does not cabin the Board where the interpretation of a union constitution is relevant to the reach of the National Labor Relations Act. The Board's attempt to carve a special niche for itself is sleeveless. The nature of a union constitution as a charter of government does not change just because

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the Board arrives on the scene. The Board has the same obligation as any other trier to honor a fair and reasonable interpretation. Nor is a simplistic rejection of recourse to implication in reading a union constitution any wiser when the Board asserts it. *Hardeman* rejected the dogma that " 'penal provisions in union constitutions must be strictly construed' " (401 U.S. at 242). That dogma does not become any more acceptable when the Board on brief enunciates an indistinguishable version by which it would confine a union constitution to its narrowest literal reading unaided by the ordinary process of implication.

The Board's attempted distinction on brief of *Hardeman* is indeed foreclosed by this Court's decision in *Allis-Chalmers*. The Court in *Allis-Chalmers* upheld the imposition of a court-collectible fine against a member for engaging in strikebreaking. But there was in that case no rule against strikebreaking as such. Guilt was based rather on " 'conduct unbecoming a Union member' " (388 U.S. at 177).[6] The union rule prohibiting "conduct unbecoming a Union member" was given specific content by interpreting it to bar strikebreaking. The rule on its face utterly lacks explicitness and depends on implication for its content. It can acquire meaning only as situations within and without its scope are spelled out in actual application. It was reasonably and fairly interpreted to forbid

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[6] See, also, *Local 248, United Automobile Workers* v. *Natzke*, 36 Wis. 2d 237, 240, 153 N.W. 2d 602, 604 (1967), the state court counterpart to the *Allis Chalmers* unfair labor practice proceeding, identifying the offense with which the member was charged as "conduct unbecoming a member for having gone back to work during the strike." Accord, *Local 248, United Automobile Workers (Allis Chalmers)*, 149 NLRB 67, 75-76 (1964), affirmed, 388 U.S. 175 (1967).

strikebreaking because of the indispensability of strike solidarity in waging economic warfare. And it was an interpretation in an area of activity which involves the National Labor Relations Act.

There is, accordingly, no principled basis for distinguishing *Allis-Chalmers* from this case in terms of the use of implication to define a union rule. In *Allis-Chalmers* a general rule prohibiting conduct unbecoming a member was interpreted to bar strikebreaking. Here an explicit rule prohibiting strikebreaking is interpreted to bar a postresignation return to work. Given the use of implication in both cases, and the area of the National Labor Relations Act in which that use operates in the one case no less than in the other, *Hardeman* can be distinguished from this case only by repudiating *Allis-Chalmers*.

But *Hardeman* and *Allis-Chalmers* are both good law. Both are responsive to careful congressional concern " 'neither to undermine self-government within the labor movement nor to weaken unions in their role as bargaining representatives of employees.' " *Hodgson* v. *Local Union 6799, Steelworkers*, 403 U.S. 333, 338-339 (1971). Each respects the objective to "preserve and strengthen unions as self-regulating institutions . . . ." *Id.* at 339. In this case, interpreting its own charter of government, the Union as a self-governing institution fairly and reasonably concluded that its rule against strikebreaking barred a postresignation return to work. The statutory question which that interpretation presents is whether a ban on postresignation strikebreaking is valid under the National Labor Relations Act. It is that question which should be decided. The Board on brief, to avoid that question of statutory construction, would hobble a union with

artificial restrictions on the interpretation of its constitution. But the question of the interpretation of the constitution is perfectly straightforward and should be straightforwardly answered without mutilating narrowness. And given the interpretation that postresignation strikebreaking is barred, the statutory question which that interpretation presents is also perfectly straightforward and the Board should stop trying to avoid a straightforward answer to it.

3. *Validity of the rule:* Boeing argues that a ban of postresignation strikebreaking is invalid on the ground that "it would, as a practical matter, deprive [an] employee-member . . . of the right to resign from the Union at any time, because (a) . . . [it] binds him to the union rules *during* a strike and (b) he is bound to membership during the life of the contract" (br. p. 29). The argument is factually flawed. An agreement cannot bind an employee to full membership; it can only obligate the employee to pay union dues and an initiation fee. The employee need not assume any other obligation of union membership. If he becomes a full member, assuming all other obligations of union membership, it is not by compulsion of the agreement but by his own election that he takes that step. And he is still free after choosing full membership to revert to the status of a limited member during the term of the agreement. Indeed, under the provisions of the IAMAW's 1972 amendment of its constitution explicitly banning postresignation strikebreaking (our brief p. 58), he may even shed the obligation to refrain from strikebreaking if he resigns his full membership more than 14 days preceding the commencement of the strike. Following the expiration of the agreement, a full member is free to sever all relations with the Union, save

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only that he must observe his preexisting obligation to refrain from strikebreaking for the duration of a current strike. His union obligations in every other respect are at an end. In short, an employee need never become a full member; he may revert to the status of a limited member at any time; and the sole restriction under the IAMAW constitution is that he must effectuate the reversion more than 14 days before a strike begins if he wishes to disavow his obligation to refrain from strikebreaking in the current dispute. This is little enough.

II. THE REASONABLENESS-OF-FINE ISSUE

1. In its brief, in addition to its assertion that the fine is excessive in amount, Boeing suggests that its imposition is arbitrary for an array of other reasons (br. pp. 7-8, 34-35, 45-47). In the Court of Appeals, Boeing made this argument in greater detail, and we include as an appendix to this brief the response we made in that court to the particularities of its claim of arbitrariness (*infra,* pp. 1a-16a).

Since the power of the Board to entertain the merits of the claim is the presently relevant point, it is pertinent to observe that Boeing would sweep the entirety of the administration of union discipline within the Board's purview. For it looks to the Board to consider not only the amount of the fine, but also the "method . . . and . . . time" of its payment, "as well as the manner in which the charges were filed and processed which led to the imposition of the fine or penalty" (br. p. 46). It seeks also an assessment of "other sanctions or punishments" imposed additional to the fine (*ibid.*). And it would inquire into "whether the employees were informed in advance" of the rule, "and

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whether they were warned in advance that they would be penalized and to what extent or degree" (*ibid.*).

This is indeed a "multiplicity of factors" (*ibid.*) and it tellingly illustrates that this maelstrom is no part of the Board's authorized business. Furthermore, it is Boeing that complains that the members have been fined in an excessive amount and by arbitrary means. The employer is surely an unlikely private attorney general to assert the member's interest in a union-member controversy centered upon a claim of arbitrary administration of internal union discipline.

2. Boeing cites and quotes from the Board's decision in *Carpenters Local Union No. 22 (Graziano Construction Co.)*, 195 NLRB No. 5, 79 LRRM 1194 (1972), to support its view that review of internal union discipline is within the Board's proper purview (br. pp. 19, 41, 43, 44, 45). But the Board in that case held only that the particular union rule there at issue was invalid because in application it abridged rights conferred by the Labor-Management Reporting and Disclosure Act. It confined itself to determining the validity of the application of the rule by reference to external statutory criteria. It made no incursion into a union's internal affairs to ascertain whether a valid rule had been arbitrarily administered because the fine was excessive, the notice insufficient, the hearing inadequate, or like defects. What Boeing would have the Board do in this case is to cross from external substantive validity into internal union administration. The Board took no such step in *Carpenters Local Union No. 22.*

We cannot, however, forbear expressing our skepticism of the soundness of the step that the Board did

take. It invalidated application of a rule because it offended the LMRDA. But enforcement of the LMRDA is no part of its business. Other agencies and tribunals are commissioned to perform that task. The Board has committed the same error for which this Court rebuked it when it invalidated a so-called "hot cargo" provision of a collective bargaining agreement because it was said to violate the Interstate Commerce Act although the administration of that statute is entrusted to the Interstate Commerce Commission. *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 108-111 (1958). The Board should stick to its own last.

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March 1973

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APPENDIX

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APPENDIX

The following is a verbatim reproduction of pages 21-36 of the Union's reply brief before the Court of Appeals addressed to the particularities of Boeing's claim in that court that the fines levied by the Union were excessive in amount and otherwise arbitrarily imposed. The record references have been renumbered to correspond with the pagination of the Appendix in this Court, and the cross-references to unprinted parts of the Union's opening and reply briefs in the Court of Appeals have been deleted.

2. The Particular Factors Said To Show That The Fines Were Unreasonably Large In Amount.

We now turn to consider the particular factors said to show that the fines were unreasonably large in amount.

(a) It is said that the fines were excessive because the strikebreakers were "required to pay amounts exceeding their earnings . . ." (Co. br. p. 14). The premise of this argument is that a fine is *ipso facto* unreasonable if it is larger than the gain which the wrongdoer realized from working during the strike in violation of his duty to refrain from strikebreaking.

The argument is irrelevant to those strikebreakers who, having appeared for trial, apologized, and pledged loyalty to the Union, were fined fifty percent of their strikebreaking earnings. Any concept of gearing the size of the fine to the amount of the earnings is surely satisfied by levying the penalty at one-half of the wrongful gain. For if the criterion is the sum that the strikebreaker earned in violation of the rule, it is clearly rational to divest the rule-breaker of the entirety of the sum—not merely one-half—that he made by reason of his breach. His fellows who did not work during the strike sustained the identical loss; they

sacrificed their pay from the struck employer. There is no reason why the strikebreaker should be in a better monetary position than the striker. In short, if measuring the fine in relationship to earnings is the sole valid criterion, it would hardly be unreasonable were a union to assess the penalty at the entirety of the sum earned in violation of the rule. The fine would do no more than equalize the financial sacrifice of the strikebreaker and the striker. In this case, therefore, levying the fine at one-half of strikebreaking earnings in consideration of the strikebreaker's repentence and pledge of future loyalty is well within any notion of reasonableness.

The Company's excess-of-earnings argument, therefore, is grounded in solicitude for the unrepentant strikebreaker who did not appear for trial and who remains unregenerate. It is that strikebreaker, the Company contends, who cannot reasonably be fined a flat sum of $450. Why? What ineluctable moral imperative commands fixing the upper limit of a strikebreaker's fine to the maximum strikebreaking pay that he earned during the period of his violation? A fine is punishment. It is traditionally assessable at a sum greater than the monetary benefit that the wrongdoer derives from his offense. An antitrust violator pays treble damages (*Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100, 113 (1969)); a Fair Labor Standards Act violator pays twice the unpaid minimum wages or the unpaid overtime compensation (Fair Labor Standards Act, § 16(b), 29 U.S.C. § 216); a tortfeasor or contract violator whose offense is considered egregious pays punitive damages (*U.A.W.* v. *Russell*, 356 U.S. 634, 646 (1958)); a thief who steals less than $100 may be fined $200, in addition to being ordered to make restitution. D.C. Code, § 22-2202 (1967). In short, since a fine is punishment, there is nothing in principle which limits a fair fine to the member's monetary gain from his rule-violation. Whether it should be more, less, or the same is a matter for the union's own independent determination as part of its autonomous right of self-government.

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Once shown that a fine need not be limited in its maximum size to strikebreaking earnings, there is nothing to suggest that the $450 fine in this case is excessive in amount. In *Scofield*, the Supreme Court stated that it "essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.*, 109 NLRB 727 (1954) . . . holding that a union could fine a member for his failure to take part in picketing during a strike . . ." (394 U.S. at 428). In *Minneapolis Star* the Board found that "the imposition of a $500 fine on Carpenter by the . . . Union is not violative of Section 8(b)(1)(A) of the Act." 109 NLRB at 729. By approving reference to *Minneapolis Star* the Supreme Court did not blink at a $500 fine. By what logic is a $500 fine for failure to perform picketing duty acceptable but a $450 fine for strikebreaking unreasonable, particularly since failure to perform picketing duty results in no strikebreaking earnings at all in contrast to the financial gain entailed in working for the struck employer? Indeed, as *Minneapolis Star* illustrates, there are many union offenses which do not involve financial gain for the violator, so that the size of the fine for the offense is often simply not measurable in terms of a violator's monetary profit from his wrong. There is no reason, accordingly, why a fine for strikebreaking should be implacably related to earnings derived from the wrong when a fine for other offenses is not.

(b) It is said that, as the "normal financial obligation of a member of the Union is discharged" by payment of "dues of $5.50 per month or $66.00 per year," a $450 fine for strikebreaking is unreasonable as "a major escalation in financial obligation" (A. 21). If ever there were a comparison of incommensurables, this is it. Dues and initiation fees are the contribution of each member to the sum necessary to operate a union. A fine is a penalty imposed for violation of a rule. One has nothing to do with the other in the amount required to fulfill the relevant purpose. One may agree that a member does not expect to pay $450

as his contribution to defraying the expense of running a union. That is very far from saying that it is not a penalty fairly contemplated for violating a basic institutional obligation to refrain from strikebreaking. Surely this distinction is within the reasonable range of the Union's self-governing discretion.

(c) It is said that the fine was unreasonable considering "the fact that employees in the New Orleans area had been subjected to the devastating effects of Hurricane Betsy a week before the strike began" (Co. br. p. 16). But this act of God did not distinguish between the striker and the strikebreaker. Both strikers and strikebreakers were alike the victims of the hurricane; both endured the same privation it inflicted. By what standard of reasonableness should the Union be expected to extend compassion to the strikebreaker who abandoned the strike in order to escape the identical distress that the steadfast striker equally suffered?

(d) It is said that the fine is unreasonable considering, if suit is instituted against the strikebreaker to collect it, "the time lost from work in defense of the civil court action and his respective attorney's fees and court costs" (Co. br. p. 15). Since the Company has undertaken the defense of the collection suits against the strikebreakers (A. 7; 77, 99-100, 109), in this case at least the Company is pleading its own litigation costs rather than the strikebreakers'. Passing that, the plea is wide of the mark. When the Supreme Court decided in *Allis-Chalmers* that a fine could validly be collected by court action, it surely did not mean an action in which the strikebreaker incurred no expense as a defendant. A reasonable fine does not become an unreasonable fine because of the cost to a strikebreaker in resisting the payment of it. For a strikebreaker, no less than for the rest of the community, "the expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration* v. *Public Service Commission*, 304 U.S. 209, 222 (1938).

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(e) Heavy stress is placed on the circumstance that in one collection action instituted by the Union—and the evidence shows only that one (A. 135, Tr. 48)—the Union in its petition sought attorneys' fees of $180 (Co. br. pp. 13, 14). If Louisiana allows attorneys' fees in that or any amount, the quarrel is with Louisiana law, not with the reasonableness of the fine. If Louisiana does not allow attorneys' fees in that or any amount, the quarrel is with an overstated request for relief—not a novelty in litigation—and again not with the reasonableness of the fine.

(f) We conclude with consideration of the standard of reasonableness innovated by the examiner. According to him, "a fine of 35 percent or less of a strikebreaker's earnings at his regular rate of pay" and of "80 percent or less of overtime or premium pay" is in totality "presumptively, a reasonable fine" (A. 30). Every party to the proceeding before the Board—the General Counsel (A. 48), the Company (A. 53), and the Union (Exc. 34, 36, 37, not reprinted in the Appendix)—expressed its dissatisfaction with this formula. It is a Procrustean solution, drawn from thin air, utterly alien to the way in which any union tribunal has ever determined what a proper fine should be, and wholly foreign to the way in which any judge has ever considered whether or not a fine was reasonable.

The examiner premises his formula on the proposition that a "reasonable fine" must be "less than a total deterrent to working during a strike"; as he sees it, a fine in an amount that operates as "total deterrence" to strikebreaking is unreasonable (A. 27). This premise is quite inexplicable. If the object of a fine is to secure observance of a rule by penalizing violation of it, it passes understanding why the fine should be fixed at a level which tempts violation by leaving a margin for profitable infraction. The examiner compounds the incomprehensible by his further assertion that a "total deterrent" interferes with an employer's "right to protect and carry on his business" dur-

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ing a strike by blocking effective recruitment of a work force from among the strikers (A. 28)! We had supposed that it could at least be taken for granted that, whatever an employer's "right" to try to operate during a strike, it was surely not a union's duty to cooperate with him by enforcing less than total observance of a rule against strikebreaking.

The examiner's tour de force demonstrates the incompatibility between NLRB inquiry into reasonableness and the statutory bar against NLRB regulation of a union's internal affairs. The infelicity of the examiner's solution suggests that he and his colleagues, well-enough versed in dealing with the NLRB's staple business, do not have the aptitude or experience requisite to the task of regulating union self-government, an area outside the sphere of their conventional concern. More fundamentally, whatever the level of competence that would be brought to bear, there can be no NLRB determination of reasonableness which does not impose upon the union the agency's judgment of how union discipline should be administered. That regulation of a union's internal affairs is simply no part of the statutory design of the National Labor Relations Act or of the job that Congress commissioned the Board to perform.

II.

THE COMPANY'S ADDITIONAL CLAIMS OF ARBITRARINESS BY THE UNION, OTHER THAN THE ALLEGED UNREASONABLENESS OF THE SIZE OF THE FINE, WERE NOT URGED BY THE GENERAL COUNSEL; THEIR ADVANCEMENT IS THEREFORE PROCEDURALLY BARRED, BESIDES BEING DEVOID OF SUBSTANTIVE WORTH.

Aside from the alleged unreasonableness of the fine, the Company urges that the Union acted arbitrarily in other respects. These additional claims of arbitrariness were not advanced by the NLRB General Counsel. We therefore consider them separately because, aside from their lack

of substantive worth, the Company is procedurally barred from presenting them in view of the General Counsel's refusal to tender them to the Board.

A. Procedural Bar

By urging claims of arbitrariness not advanced by the General Counsel the Company seeks to enlarge upon the complaint that the General Counsel issued and litigated. This is especially evident in that the General Counsel and the Union stipulated, but the Company did not, that there was no issue concerning the regularity and fairness of the internal union proceeding eventuating in the imposition of the fines (A. 80-81, 118-119).

Section 3(d) of the Act bars the Company's attempt to enlarge the issues tendered by the General Counsel. That section provides that the General Counsel "shall have final authority . . . in respect of the . . . issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board . . . ." In obedience to this command, it is the Board's settled interpretation that "the decision whether to issue a complaint, the contents of the complaint, and the management of the prosecution before the Board is entrusted to the sole discretion of the General Counsel . . . . It follows that only the General Counsel may move to amend a complaint to allege an additional violation of the Act. Otherwise the management of the cause would *pro tanto* be taken from the General Counsel and entrusted to a private party, which is contrary to the scheme of the statute and the specific provision of Section 3(d)."[20] This Court, as others, has uniformly ap-

[20] *Sailors' Union of the Pacific*, 92 NLRB 547, n. 1 (1950). See also, *Local 1012, UE (General Electric Co.)* 187 NLRB No. 46, sl. op. p. 4, n. 2, p. 5, n. 10, 76 LRRM 1038 (1970); *Sunbeam Plastics Corp.*, 144 NLRB 1010, 1011, n. 1 (1963); *Dallas Concrete Co.*, 102 NLRB 1292, 1296-97 (1953); *Crowley's Milk Co.*, 88 NLRB, 1049, 1073 (1950); *Times Square Stores Corp.*, 79 NLRB 361, 365 (1948).

proved the construction that the Board "lacks power to allow amendment of a complaint without consent of the general counsel." [21]

Furthermore, even were there power to adjudicate claims at the instance of a private party which the General Counsel does not allege, there is an insuperable procedural due process objection to their entertainment in this case. For there has been no adequate notice that the claims were at issue, nor any fair opportunity to defend against them. It is elementary that "the Board may not make findings of fact and order related remedies on issues not charged in its complaint or litigated in the subsequent hearing," particularly where the notice that a respondent has been given by the General Counsel is that the claim is *not* in issue.[22]

Accordingly, the Company is foreclosed from presenting the additional claims it seeks to tender, both because it would circumvent the General Counsel's final authority over the issuance, scope, and prosecution of the complaint, and because of the fundamental unfairness of confronting a party with a claim of which it had no adequate notice and against which it had no sufficient opportunity to be heard in defense.

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[21] *International Union of Electrical Workers* v. *N.L.R.B.*, 110 U.S. App. D.C. 91, 289 F.2d 757, 761-762 (1960). See also, *Steelworkers* v. *N.L.R.B.*, 129 U.S. App. 260, 263, 393 F.2d 661, 664 (1968); *National Maritime Union* v. *N.L.R.B.*, 423 F.2d 625, 626 (C.A. 2 1970); *Wellington Mills Division, West Point Mfg. Co.* v. *N.L.R.B.*, 330 F.2d 579, 590-591 (C.A. 4 1964), cert. denied, 379 U.S. 882 (1964); *Piasecki Aircraft Corp.* v. *N.L.R.B.*, 280 F.2d 575, 588 (C.A. 3 1960), cert. denied, 364 U.S. 933 (1961); *N.L.R.B.* v. *Bar-Brook Mfg. Co.*, 220 F.2d 832, 834 (C.A. 5 1955).

[22] *General Teamsters Local 992* v. *N.L.R.B.*, ——U.S. App. D.C. ——, 427 F.2d 582, 588 (1970). See also, *Rodale Press* v. *F.T.C.*, 132 U.S. App. D.C. 317, 320-322, 407 F.2d 1252, 1256 (1968); *S.S. Kresge Co.* v. *N.L.R.B.*, 416 F.2d 1225, 1234-1235 (C.A. 6 1969).

B. Substantive Merits

The procedural bar aside, consideration of the merits of the Company's claims of arbitrariness shows that nothing would be left of the design of the proviso to exclude a union's internal affairs from NLRB oversight were those claims thought to present issues cognizable under section 8(b)(1)(A) of the Act.

1. The Company complains that "neither before nor during the strike did the Union warn employees that fines or any other action would be taken against those who worked during the strike" (Co. br. pp. 12-13). But the IAMAW Constitution explicitly defines misconduct of a member to include "Accepting employment in any capacity in an establishment where a strike . . . exists as recognized under this Constitution, without permission" (A. 5; 143). And the Constitution is no less explicit that commission of this offense, like others, shall "warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing . . ." (Pet. 36a, A. 5; 142). There was, therefore, ample forewarning. Moreover, it beggars belief that any union member, or any person living in today's industrial society, can fail to know that strikebreaking is a cardinal union offense. This record shows actual knowledge (A. 60-61, 69-70, 73-74). There is thus an explicit written rule and ample evidence that the standard of conduct it requires was known. This is more than enough. *International Brotherhood of Boilermakers* v. *Hardeman*, 39 U.S.L.W. 4275, 4278-79 (S. Ct. Feb. 24, 1971). It is therefore unnecessary to invoke the view that "where a member's act is clearly in derogation of an obvious group interest, either because the group's dedication to particular ideas or goals is clear or because the member's act is especially hostile to more general group interests, the association could properly expel un-

der a very vaguely worded rule, or indeed without any rule."[23] Nor is it necessary to remind that the "rule that 'ignorance of the law will not excuse' . . . is deep in our law . . . ."[24]

This answers the Company's insistence that the IAMAW constitutional "provisions had not been effectively communicated to the employees" (Co. br. p. 14). We add the NLRB General Counsel's own refutation of the Company's claim made in his brief to the Board (p. 5):

> Members may reasonably be expected to be aware of the duty of loyalty, even absent general provisions therefor commonly found in union constitutions . . . . Moreover, it would be manifestly unfair to require a union to warn its members about conduct in which they have not yet engaged and which the union could not reasonably be expected to anticipate. Indeed, where the amount of the fine turns out unreasonable, the warning could be interpreted as a threat which itself may constitute a violation of Section 8(b)(1)(A).

A final variant is the Company's assertion that "[n]o consideration was given" to "whether or not . . . [an individual] knew he was in violation of the Union's rules" (Co. br. pp. 15, 26). The short answer to this plea in mitigation is that there is no sufficient evidence of individual ignorance. Those who did not appear for trial can hardly complain that they did not receive the benefit of a plea that they did not make. Those who appeared for trial, apologized, and pledged loyalty to the Union received the benefit of a reduced fine of fifty percent of strikebreaking earnings. Finally, whether an individual plea of ignorance if made should be believed, and the effect to be given to it if credited, are surely matters within a union's self-

[23] Note, *Developments in the Law, Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 985, 1018 (1963).

[24] *Lambert* v. *California*, 355 U.S. 225, 228 (1957).

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verning discretion. A plea of "individual circumstances" (Co. br. p. 15) cannot be, as the Company would have it, e subject of a mass claim unrelated to a particular per-n; it must be a pinpointed personalized inquiry directed a specific individual, a course the Company does not take d for which the record would be quite inadequate.

2. The Company asserts that "Fines had never been vied on members of the Union before for any reason" (Co. br. p. 13). But the Union had been in being only about o years when the strike took place (Pet. 35a, n. 1, A. 4; -79), so that it did not have a long history. It was em-wered by the IAMAW Constitution to levy fines, and ere is utterly no basis for an implied claim that the power d evaporated by desuetude.

3. The Company complains that "trials were held even the employee did not appear" (Co. br. p. 13). The AMAW Constitution provides (A. 145), and each accused s informed that (Pet. 36a, A. 5; 163), "if you fail to pear when notified, the trial shall proceed as though the ember were in fact present." Accordingly, each accused s afforded the opportunity to be present, and an ac-sed's failure to appear was his own voluntary act. "The ght to be present may be waived by a party or his counsel voluntary absence from the courtroom at a time when it known that proceedings are being conducted or are about take place, and in that event the trial may proceed . . ."[25] Section 101(a)(5) of the LMRDA provides that member may be disciplined unless "afforded a full and r hearing", but this obviously does not mean that an used may defeat the administration of discipline by luntarily absenting himself from the hearing which is orded him.

4. The Company complains that "[t]here is no evidence t anyone was found not guilty" (Co. br. p. 13). This

[25] 5 Moore's Federal Practice ¶ 39.14, p. 748 (2d ed. 1969).

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is erroneous in fact and irrelevant in law. The record shows a "Not Guilty" verdict as to two accused, a "No Fine" disposition as to a third, and a "mistrial" without retrial as to a fourth (A. 174, 81-82, 126). In any event, if all accused are guilty there is no reason why any should be found innocent.

5. The Company complains that there "was no notification to employees by the Union that it had reduced or would reduce the fines under some circumstances" (Co. br. p. 13). The accused employees would have known of the availability of reduced fines for repentant strikebreakers had they appeared for trial or at the ensuing union meeting at which their penalty was determined. Any ignorance by the employees—if indeed they were ignorant—resulted from their own failure to participate in the proceedings, and is their own fault for which they have no one to blame but themselves.

6. The Company complains that the "notification to the employees of the charge against them did not advise them of the penalties which might be imposed upon them" (Co. br. p. 13). Section 101(a)(5) of the LMRDA provides that a member be "served with written specific charges." This requires that the elements of the alleged offense be set forth, but it does not require a statement of the potential range of discipline in the event that guilt is found. The object of a charge is to give "an accused member . . . sufficient notice to enable him to prepare his defense,"[26] and fulfillment of this object does not require apprisal of the potential penalty in the charge itself.

7. The Company complains that the "amount of $450.00 was determined before any of the hearings or trials were held . . ." (Co. br. p. 15). All that the record suggests is that the officers of the Union recommended the size of the

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[26] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1079 (1951).

fine to the trial committees (A. 123). But there is nothing to show that each trial committee did not, as required by the IAMAW Constitution, retain full power to "consider and agree upon its recommendation of punishment," and that the members at the ensuing union meeting to consider the recommendation did not retain full power to decide what the punishment should be (A. 146-147). And that the power was in fact exercised is shown by the fifty-percent-of-strikebreaking-earnings fine assessed against the repentant strikebreakers.

8. According to the Company, a "request was made to the Company by the Union that certain of the fined employees be discharged, and it waited until January 8, 1968, to withdraw the request" (Co. br. p. 14). The Company's thought must be that the Union attempted job discrimination, and that an otherwise unobjectionable fine becomes tainted with illegality if job discrimination is attempted at the same time.

The claim is baseless. The paradigmatic situation existed in *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954). There the Board remedied the discriminatory deprivation of work sustained by the employee (*id.* at 728), but declined to interfere with the fine imposed upon him for violation of the union rule (*id.* at 729). The Supreme Court in *Scofield* approved *Minneapolis Star* in terms, observing that it "essentially accepted the position" of the Board exemplified by *Minneapolis Star* "where the Board . . . distinguished internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority without triggering violations of §§ 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3)." 394 U.S. at 428.

Accordingly, assuming that the Union attempted job discrimination in this case, it has nothing to do with the con-

tinuing vitality of the Union's independent right to fine for strikebreaking and to collect the fine by means other than job discrimination.

9. The Company complains that the Union in its newspaper castigated the strikebreakers (Co. br. pp. 15-16). Strikebreaking is not an endearing activity and the expression of resentment against it is the exercise of freedom of speech.

10. The Company contends that the Union could not fine even those members who did *not* resign from the Union. The basis of this contention is the claim that "some or all" of the strikebreakers who "did not resign" failed to do so "because they were told they could not do so or were not aware that they could do so" (Co. br. pp. 18-19). Accordingly, the argument runs, their membership was "involuntary," and an "involuntary" member is not subject to union discipline (Co. br. pp. 18-19, 26-27).

The Company first advanced this theory to the Board in a "supplemental and reply brief" served May 2, 1969, four months after the trial examiner's decision issued. This is too late. The "time for giving notice of the matters of fact and law asserted is prior to the hearing, not in . . . [a] 'post-complaint theory of the case' unveiled in a post-hearing brief."[27]

On its merits, the claim of "involuntary" membership is singularly untenable. Under the terms of the union security agreement between the Company and the Union (A. 154-158), no employee who is not a member of the Union need join the Union, so that all employees who did become members did so because they wanted union membership. Furthermore, even if it could be said that membership was

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[27] *N.L.R.B.* v. *Majestic Weaving Co.*, 355 F.2d 854, 861 (C.A. 2, 1966); *Boyle's Famous Corned Beef Co.* v. *N.L.R.B.*, 400 F.2d 154, 164-165 (C.A. 8, 1968); *S.S. Kresge Co.* v. *N.L.R.B.*, 416 F.2d 1225, 1234-1235 (C.A. 6, 1969).

constrained, the Supreme Court in *Allis-Chalmers* ruled that, so long as an individual was a full member, regardless of the reason for his status, he was subject to union discipline to require his observance of union rules. The Court explained that (388 U.S. at 196):

> The majority *en banc* below nevertheless regarded full membership to be "the result not of individual voluntary choice but of the insertion of [this] union security provision in the contract under which a substantial minority of the employees may have been forced into membership." 358 F.2d, at 660. But the relevant inquiry is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed the union's picket line. It is clear that the fined employees involved in these cases enjoyed full union membership. . . . Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary.

The Company seeks to finesse the *Allis-Chalmers* ruling by arguing in effect that, even though it does not matter whether or not membership was initially compelled, the member must have and be told that he has a wholly unconstrained opportunity to resign at will at any time. At this point the Company's position and the Union's position are in full collision. For it is the Union's position that, whatever right to resign that a member has and exercises, a mid-strike resignation does not free a member from his existing obligation to refrain from strikebreaking for the duration of the current controversy.

Finally, even were the Company's legal position tenable, there is no factual predicate for its assertion. The record shows—the evidence having come in on another issue—that any member who wanted to resign knew that he could and how to go about it. The examiner found that "in the past,

in 1963," the Company "believed and so advised personnel when such matters arose, that, in a no-contract period, an employee, who wished to resign from the Union and to discontinue authorization for check off of dues, could do so by writing to the Company and to" the Union (A. 8; 92, 107), and "the Company had no reason to believe that its understanding of the procedure was disputed" (A. 8). Based on its understanding, the Company during the current controversy advised its labor relations personnel that, if they were asked by union members about resignation, they should tell the member that "in the past, the procedure has been to send a registered or certified letter to the Union and to the Company . . . stating he wishes to terminate his membership in the Union and to cancel his payroll authorization for Union dues deductions" (A. 9; 90-92, 187, 102-103). Supervisors and other management people did tell members that resignation could be effected by writing to the Union and the Company (A. 9-10; 104, 68-69, 73, 116, 129). As one witness stated, "It was general all over the plant that you . . . just had to send the letters . . . " (A. 68). And 119 members did resign (Pet. 35a), a number which graphically confirms ample knowledge that resignation could be effected. Accordingly, there is simply no factual basis for the Company's assertion that strikebreakers who did not resign failed to do so "because they were told they could not do so or were not aware that they could do so" (Co. br. pp. 18-19).

In sum, we have explored the merits of the Company's claims of arbitrariness, not because their decision is properly the office of this proceeding, but to show by their character that they are simply not the business of the Board. Review of the administration of union discipline to enforce a valid rule is a field foreign to the Board.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

SUPREME COURT, U. S.
FILED
MAR 26 1973
MICHAEL RODAK, JR., CLERK

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY.

No. 71-1607

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

THE BOEING COMPANY AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1417.

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY.

No. 71-1607.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE BOEING COMPANY AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA.

INTEREST OF THE AMICUS CURIAE.*

The Chamber of Commerce of the United States is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber has appeared in this Court as *amicus curiae* in a broad spectrum of labor relations matters substantially affecting the legitimate and vital interests of its members. Examples of such cases in which the Chamber has most recently participated include *N. L. R. B.* v. *Granite State Joint Board*, ... U. S. ....., 34 L. Ed. 2d 422 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970).

The issues presented here are particularly important to the Chamber's members, many of whom are engaged in commerce and, together with their employees, are subject to the provisions of the National Labor Relations Act. In particular, the question raised in No. 71-1417—whether this Court's decision in *Granite State Joint Board*, *supra*, can be avoided by an asserted "limitation" in the union constitution against accepting employment in an establishment where a strike exists—poses serious concern to the balance struck by this Court in *Granite State Joint Board* between union disciplinary powers and employee rights to resign union membership and refrain from strike action. Similarly, the issue in No. 71-1607—whether the "reasonable-

* The instant brief is filed with the written consent of all parties in both 71-1417 and 71-1607, pursuant to the rules of this Court.

ness" of union fines can and should be determined by the National Labor Relations Board within the operational framework of Section 8(b)(1)(A)—is particularly significant to articulation of the accommodation of conflicting economic interests effected by this Court in *Granite State Joint Board, Scofield* v. *N. L. R. B.*, 394 U. S. 423 (1969) and *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967). Both issues encompass the same underlying area of inquiry—the extent to which unions can discipline and enforce such discipline against their members.

Effectuation of the Act's purpose and policy by striking a proper balance between an individual's freedom of choice, a union's interest in solidarity and adherence and an employer's need to be free of the burden of coerced strike conduct required the Chamber's participation in *Granite State Joint Board.* This same necessity impels the Chamber's submission of its views to the Court here. For the same reasons as most recently expressed in *Granite State Joint Board*, the practical importance of these matters to the Chamber's members and the right of their employees to refrain from engaging in union activities as guaranteed in Section 7 of the Act, require and underline the Chamber's position before this Court.

SUMMARY OF ARGUMENT.

A. Enactment of Section 8(b)(1)(A) of the Act and amendment of Section 7 to guarantee employees "the right to refrain from any or all (union) activities", in the conceptual context of the "contract-constitution" rationale applicable to the relationship between union and member, evidenced a Congressional purpose to prevent unions from coercing employees to engage in strike or other such union-directed conduct against their will. In allowing unions to expel those who disregard union-imposed requirements, such as by refusal to strike, Congress accommodated the

union's "institutional" need to achieve solidarity in the use of the strike weapon with the employee's individual right to refrain from strike activity without coercion. This Court's decision in *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), permitting a union to levy "reasonable" fines on its members, carefully extended the legislative balance of rights created by the Act recognizing at the same time that "a few well-placed, sincere penalties can mark the danger lines which cautious members will not dare to cross" (Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1050 (1951)). Any further extension of union disciplinary power—through grant of the right to fine non-members upon an "implied" contractual agreement in a union constitutional rule as sought by the petitioner in No. 71-1417 or disregard of the rule of "good faith" and "reasonableness" as demonstrated by petitioner in No. 71-1607—would not only judicially repeal the guarantees of Section 7 but undercut the very "contract-constitution" principles upon which this Court has explicated its decisions in the area of union-member relationships (e.g., *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 at 182).

B. Granting unions the power to impose unlimited fines on members who resign or to so fine members for conduct subsequent to resignation on the basis of an implied obligation which survives resignation not only creates an imbalance upon the Section 7 right not to strike but also eviscerates this Court's decisions in *Scofield* v. *N. L. R. B.*, and *N. L. R. B.* v. *Granite State Joint Board*. In *Scofield*, this Court's accommodation of union discipline with individual freedom turned upon the following lines between permissible and impermissible union action against members: ". . . Section 8(b)(1) leaves a union free to enforce a properly adopted rule which . . . is *reasonably enforced* against union members who are *free to leave the union and escape the rule. . . .*" (emphasis added) In *Granite State*

Joint Board, this Court reaffirmed the principle of *Scofield* and firmly established the precept that "when a member lawfully resigns from the union, its *power* over him *ends*" (emphasis added). Petitioner in No. 71-1417 advances no constitutional or bylaw provision defining or limiting the circumstances under which a member may resign—the only issue left open by this Court in *Granite State Joint Board,* but seeks to avoid both *Scofield* and *Granite State Joint Board* through the extension of union power over a resigned member and/or post-resignation conduct where such power is "necessary" to enforcement of a "just and reasonable" union rule against accepting employment in a struck place of employment. Contrary to the assertion of petitioner in No. 71-1417 this matter does not present the question reserved in *Granite State Joint Board* (Pet. Brief, p. 57) but instead constitutes the effort of petitioner to emasculate *Scofield* and *Granite State Joint Board.* To permit unions to extend power over non-members by the exercise of disciplinary action against post-resignation conduct contrary to a union rule against "accepting employment" (compulsory strike activity) disregards a basis of free institutions —the right of the individual to join or to resign from associations as he sees fit, subject only to *financial obligations* due and owing (at the time of resignation) *Communications Workers* v. *N. L. R. B.*, 215 F. 2d 835, 838 (2d Cir. 1954)).

C. Satisfaction of the legitimate institutional needs of unions neither requires nor supports the extension of disciplinary power over those who decide to resign membership by the enforcement of a "union obligation" implied from the member-union contract,—the constitution. Without such an extension of power in derogation of the rights to join and resign, the substantial weapons unions already possess to expel and fine are sufficient for "enforcement" of the majority's will. To afford unions the further power to compel obedience to union-directed conduct notwithstanding

resignation would permit not just an effective strike weapon but the means by which to coerce compliance with union strike objectives. Neither the terms of the statute, its legislative history, sound policy nor the principles applicable and necessary to free institutions allow such a result.

D. Advancement and reliance on such concepts as estoppel and "implied obligations" as analytical devices to determine the statutory rights of strikers and foreclose the associational rights of union members to resign are neither appropriate nor logical. Such concepts presuppose conduct knowingly and voluntarily undertaken notwithstanding the plain facts that union membership and the duties and obligations imposed by the union's constitution and bylaws are not voluntarily assumed in any meaningful sense. Thus, an employee desirous of a voice in the collective bargaining process conducted by a union as "exclusive bargaining representative" has no choice but to join —the terms on which the employee obtains membership are not "bargainable" and the employee has no option as to which or how many constitutional and bylaw obligations, unilaterally imposed by the union as an institution, shall be assumed. It is, therefore, unrealistic to contend that any employee upon assuming union membership undertakes an unqualifiable and non-terminable "union obligation" to strike for an unlimited time notwithstanding resignation. Such "survival" of union power over an employee after termination of the union-member relationship can neither be "implied" from union rule nor derived from the "good faith" and "reasonableness" standards inherent in the "contract-constitution" doctrine.

E. The salutary principle that any contractual relationship encompasses and rests upon the factors of "good faith" and "reasonableness" by implication of fact and operation of law (1 Corbin, *Contract*, 276-355), transposed into the area of union-member relationships through the "contract-constitution" doctrine (*Local 1912, I. A. M.* v.

United States Potash Co., 270 F. 2d 496, 498 (10th Cir. 1959)), cert. denied, 363 U. S. 845 (1959), derives from this Court's decisions in *Allis-Chalmers*, *Scofield* and most recently *Granite State Joint Board*. In each of these cases, as in the decision of the court below and the parallel decision of the Ninth Circuit Court of Appeals in *Morton Salt Co.* v. *N. L. R. B.*, ...F. 2d ....., 82 LRRM 2066 (1972), accommodation of the union's institutional need to exercise disciplinary power for the achievement of "union objectives" with the Section 7 rights of individuals to act without restraint or coercion turns upon the very factors of "good faith" and "reasonableness". Where the imposition of discipline is taken for causes not "reasonably" related to the union's institutional requirements, the restraint or coercion flowing from its imposition is violative of 8(b)(1)(A) (*e.g.*, *N. L. R. B.* v. *Industrial Union of Marine and Shipbuilding Workers*, 39 U. S. 418 (1968)). Where, as here, the disciplinary action is not "reasonable" to or in keeping with the "good faith" requirements of the associational relationship between union and member, the coercion inherent in "unreasonable" discipline similarly violates 8(b)(1)(A).

F. Granting unions the right to fine non-members for refusing to strike would adversely affect Congress' intent to promote free collective bargaining in which ". . . the results of the contest [are left] to the bargaining strengths of the parties." *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). Inherent in this concept is the premise that the nature of the harm which a strike,—a statutorily-sanctioned form of economic warfare,—imposes on the parties should affect their bargaining posture and the ultimate terms upon which they resolve their dispute. To permit unions to fine non-members, thus in effect preventing them from responding to the economic pressures which their strike set in motion, constitutes an artificial restraint on the process of collective bargaining.

ARGUMENT.

Introduction: A Framework for Analysis.

In the course of "elucidating litigation" over the past several years dealing with the accommodation of a union's institutional requirements to exercise disciplinary power with the statutory right of employees to enjoy Section 7 rights without "restraint" or "coercion", this Court has articulated the basic elements necessary to achieving the proper balance of conflicting interests. *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967) and *Scofield* v. *N. L. R. B.*, 394 U. S. 423 (1969) mark out three (3) of the fundamental areas of concern under Section 8(b)(1)(A):

(i) the union obligation sought to be enforced must be one properly related to the union as an institution;

(ii) "enforcement" by court-collectible fine must be "reasonable"—that is, the equivalent of the union's proviso-guaranteed right to expel from membership through affording the member the choice to escape discipline by resignation;

(iii) where fines are imposed, the amount must be "reasonable" under the circumstances.

Both *N. L. R. B.* v. *Industrial Union of Marine and Shipbuilding Workers*, and *N. L. R. B.* v. *Granite State Joint Board*, further refine and delineate these three (3) areas of inquiry: the former concluded that insulation of the union from the proper scrutiny of unfair labor practice charges is not an objective properly related to or "reasonably required" for the unions' existence as an institution; the latter determined that the union's power to discipline for a "reasonable" objective, being co-extensive with its ability to expel, terminates upon the member's exercise of that alternative by resignation; both decisions, implicitly and expressly, demanded that where discipline

is channeled into fine imposition, the fine must be "reasonable" to withstand 8(b)(1)(A) violation.

Each of these cases involved a union's leveling of fines against members and non-members (after resignation) and required a structured accommodation of unions' institutional needs to compel obedience with the rights of employees to take action disapproved by the union, as guaranteed by Section 7 of the Act. In effecting this balance of conflicting statutory rights, giving due consideration to Congress' purpose to promote free collective bargaining determinative by bargaining strengths alone (*H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970)), the Court has stressed the "contract" basis of the union-member relationship (*N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 at 182). The implication of this contractual basis describes a fourth area of concern in the articulation of the boundaries set by Section 8(b)(1)(A)—that is:

> (iv) whether the disciplinary action imposed is within or outside the standards of "good faith" and "reasonableness" inherent in the contract-constitution.

Where, as in the instant case, the discipline imposed is asserted to be outside the standards of "good faith" and "reasonableness", adjudication by the administrative body charged with labor relations expertise is required under Section 8(b)(1)(A). In requiring the National Labor Relations Board to assess and determine "reasonableness" as a part of its administration of Section 8(b)(1)(A), the court below has given effect to the content of Section 7 as applied to dissenting employees through the parameters of 8(b)(1)(A) as drawn by this Court. This result satisfies the will of Congress, the design and structure of the Act and the practical needs of employees in their associational relationships with their union and their fellow employee-union members.

A. Section 8(b)(1)(A) Proscribes the Imposition of Fines Upon Employees Who Resign and Demands the Determination of the "Reasonableness" of Fines Levied on Members.

The legislative history of Sections 7 and 8(b)(1)(A), and the course of judicial construction with respect to the interaction of those sections, illustrate the propriety of the decision of the court below. Congressional concern with the right of employees to a reasoned choice with respect to strike participation was evidenced in the enactment of Section 7 providing that "employees shall have the right to self-organization, to form, join or assist labor organizations . . . and . . . to refrain from any or all of such activities." The purpose behind incorporation of the "right to refrain" language in the 1947 amendments to the Act *vis a vis* Section 8(b)(1)(A) was directed to:

> ". . . make the prohibition contained in Section 8(b)(1) apply to coercive acts of unions against employees who do not wish to join or did not care to participate in a strike or picket line."[1]

Congressional objectives to free employees from coercion to engage in strike activity are demonstrated by the inclusion of such individual rights in Section 7, their protection in Section 8(b)(1)(A) and the legislative debates which preceded enactment. In structuring the interplay of these provisions of the Act, legislative discussion centered upon the individual worker's right to make effective individual choices with regard to union-directed activities and the correlative need to be free from union coercion to act contrary to such individual choice.[2] At the same time,

1. 93 Cong. Rec. 6859, II Legislative History of the Labor Management Relations Act of 1947, 1623 (hereinafter cited Leg. Hist.).

2. This purpose is evidenced in the statements of Senator Taft throughout the course of the legislative debates. For example:

> "If there is anything clear in the development of labor union history in the past ten years, it is that more and more labor

recognition of the institutional requirements of unions to maintain the effectiveness of strike activity[3] and implicit acknowledgment of the coercive impact of fines in assuring obedience to union directives[4] were parts of the context within which these legislative deliberations occurred. This recognition took into account the fact that provisions defining punishable conduct were considered to be "part of the contract between member and union."[5]

Accommodation of the structure of Sections 7 and 8(b)(1)(A), given this legislative history and taking into account the law applicable to free institutions and associations, is reflected in the decisions of this Court. The power of a union to impose reasonable fines upon its members to compel obedience to union directives and objectives as set out in *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967) and *Scofield* v. *N. L. R. B.*, 394 U. S. 423 (1969) is counterbalanced by the right of the member, under necessary standards of associational law, to resign from the union and escape the rule whose enforcement is sought by fine (*Communications Workers* v. *N. L. R. B.*, 215 F.

union employees have come to be subject to the orders of labor union leaders. The bill provides for the right of protest against arbitrary powers which have been exercised by some of the labor union leaders." (93 Cong. Rec. 4023, II Leg. Hist. 1028.)

3. Thus, Senator Taft explained.

"I can see nothing in this pending measure which . . . would outlaw strikes . . . It would not outlaw anybody striking who wanted to strike . . . all it would do would be to outlaw such restraint and coercion as would present people from going to work if they wished to go to work." (93 Cong. Rec. 4436, II Leg. Hist. 1207.)

4. It was, and remains, axiomatic that "a fine is by nature coercive" (*Local 138, Operative Engineers*, 148 NLRB 679, 682). The distinctive nature of a fine, as a sum "fixed in terrorem", was well settled in the common law at the time of the legislative debates. See, e.g., Oleck, *Damages* Sections 6, 8; 36 CJS, *Fines*, Section 1.

5. *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 at 182 (1967).

2d 835 (2d Cir. 1954)). Once resignation is effective, power to compel obedience to associational rule ends, the attempt to enforce such obedience, necessarily falling outside the confines of internal union structure, constitutes statutorily proscribed coercion. This is the lesson of *N. L. R. B. v. Granite State Joint Board*. Such post-resignation power to force conformance to union directive cannot, as petitioner seeks in No. 71-1417, be created by an implied promise made while a member to refrain from accepting employment with any struck employer. Thus, this Court has made clear the fact that only financial obligations existing at the time of resignation can be enforced after resignation —no "obligation" of fealty to union directive survives membership termination. In this connection the Court stated in *N. L. R. B. v. Granite State Joint Board*, at 426:

> "We have, therefore, only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated."

Concommitant to the "associational-contract" principles underlying the issue of union power over those who resign are the implied covenants of good faith, fair dealing and reasonableness "which inhere in every contract" (*Local 1912, I. A. M. v. United States Potash Co.*, 270 F. 2d 496, 498 (10th Cir. 1959), cert. denied, 363 U. S. 845 (1959)). The law normally applicable to free institutions,—which includes the right to resign free of prospective adherence to association rule,—marks the line between permissible and impermissible union action under Section 8(b)(1)(A) and thus delineates the ambit of Section 8(b)(1)(A)'s operation with respect to union action against members. This delineation explains this Court's express and implicit requirements in *Allis-Chalmers*, *Scofield* and *Granite State Joint Board* that 8(b)(1)(A) is not called into play where

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the fine is "reasonable". Where, however, the fine is excessive or unreasonable, the ordinary contract principles applicable to free institutions cannot insulate union action against members from the operation of Section 8(b)(1)(A) without also repudiating the structure of the Act and the historic matrix surrounding enactment of Sections 7 and 8(b)(1)(A). Thus, the concepts of "fairness" and "reasonableness" are inherent to the constitution-contract between union and member.[6] When those concepts are transgressed by the imposition of an excessive fine, for example, the disciplinary power is thus no longer "internal" to the union within the boundaries of the constitution-contract but "external" and within the standards of Section 8(b)(1)(A).

> "The effects of unionism are undoubtedly to democratize industrial management in the sense that autocratic powers of employers are restricted by rules and regulations negotiated with representatives of the workers . . . If labor organizations also exercise autocratic powers over their members, their workers may merely be substituting dictatorial rule of union officials for the arbitrary authority of the employer or his managers."[7]

Petitioner in No. 71-1417 seeks to create a power over employees who resign through the medium of an obligation to obey union directives or rules implied upon the concepts of "fairness" and "good faith" inherent in the contract-constitution. Such a contention not only would

6. The dependence of "realistic" interpretations of union constitutions upon the standards of good faith and reasonableness is stressed by Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049 (1151) who notes at 1056:

> "Membership in a union contemplates a continuing relationship with changing obligations as the union legislates in a monthly meeting or in annual conventions. It creates a complex cluster of rights and duties expressed in a constitution. In short, membership is a special relationship."

7. W. Leiserason, *American Trade Union Democracy*, 54 (1959).

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vitiate this Court's decision in *Granite State Joint Board* but also would destroy the fundamental principles of law applicable to free institutions upon which *Granite State Joint Board, Scofield* and *Allis-Chalmers* have been established. At the same time, petitioner in No. 71-1607, by disclaiming the Congressionally-placed authority to determine the "reasonableness" of union fines, would have this Court circumscribe the intended operation of Section 8(b)(1)(A) from its reach of matters outside the structure of the union-member (contract) relationship to the narrow area of improper union rules. This Court's continued emphasis upon the "reasonableness" of the fine amount in *Allis-Chalmers, Scofield* and *Granite State Joint Board* illustrates the misdirection of petitioner's effort in No. 71-1607 and the necessity that the National Labor Relations Board determine under 8(b)(1)(A) whether the fine exceeds the limits of the contract-constitution on the same bases normal to any free institution. The necessity of such a determination is even more evident in view of the increasing recognition that unions, having been clothed by Congress with extraordinary powers in a field of vital public importance, must be restricted by a corresponding duty to their members.[8] The decision of the Court below properly accomplishes such a restriction in accord with the purposes and policy of the Act and the decisions of this Court.

B. Union Discipline of Members Who Resign on the Basis of an Implied Promise of Perpetual Union Fealty Is Neither "Reasonable" Nor Consistent with This Court's Decision in Granite State Joint Board.

Prior to its decision in *Granite State Joint Board*, this Court emphasized the predominance of Section 7 in the statutory scheme by empowering the N. L. R. B. to enjoin

8. *Steele v. Louisville & N. R. R.*, 323 U. S. 192, 202-203 (1944); and see, Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, at 819-820 (1960).

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state action which impinges upon rights granted in the Act *N. L. R. B.* v. *Nash-Finch Co.*, U. S. 138 (1971). Consistent with this emphasis, and consonant with the lines drawn in *Scofield* v. *N. L. R. B.*, this Court held in *Granite State Joint Board* that "when a member lawfully resigns from the union, its power over him ends" (34 L. Ed. at 425). An essential aspect of this Court's decision in *Granite State Joint Board* was the subsidiary conclusion that union members possess the same *associational rights* as applicable to any other free institution,—the right to join or resign as the member sees fit subject only to any financial obligations then accrued to the group. Although petitioner in No. 71-1417 argued in the court below that its members could only resign "by death", petitioner has changed its contentions before this Court in apparent response to the Court's *Granite State Joint Board* decision. Petitioner now maintains that regardless of the fact of resignation or the effectiveness of such resignation, the power of discipline survives termination of the associational relationship and can be exercised on the basis of an implied "good faith" promise to abide a union rule against employment at any establishment on strike (Brief for Petitioner in No. 71-1417, pp. 57-90).

Contrary to petitioner's contention that this question of "survival" of the power of discipline presents the question reserved in *Granite State Joint Board* (Brief for Petitioner, p. 57) the facts show the issue to be nothing other than an attempt to relitigate and dismember the holding in *Granite State Joint Board*. Thus, the union constitutional provision in question here does not "define or limit the circumstances under which a member could resign" and, in fact, the relevant contract-constitution contained no provision whatever concerning "resignation". Absent such a provision with respect to "the right to resign", members can resign at any time (*N. L. R. B.* v. *Mechanical and Allied Production Workers, Local 444*, 427 F. 2d 883 (1st Cir.

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1970); *Communicatioins Workers* v. *N. L. R. B.*, 215 F. 2d 835 (2d Cir. 1954)).

Extension of union disciplinary power over members who resign, via a theory of survivorship of the "contractual" obligation to refrain from working for a struck employer, may not be implied from the requirements of "good faith" and "reasonableness" inherent in the contract-constitution; rather, such an extension is diametrically opposed to the rationale and intendment of the Act and this Court's decisions. In *Allis-Chalmers*, this Court emphasized that coercion through *reasonable* fines was tolerated, within the confines of contract-constitution, by virtue of a subsisting union-member relationship and, therefore, did not fall under the scrutiny of 8(b)(1)(A). However, in *Scofield*, the Court clarified the import of *Allis-Chalmers* and its meaning in achieving a balance between individual freedom to resist union-directed activities and the union's institutional need to compel adherence to its objectives: "reasonable" enforcement was sanctioned only where "union members . . . are free to leave the union to escape the rule" (394 U. S. 423, at 430). The import of *Scofield*, —that union discipline cannot reach an employee who resigns from membership before committing the act for which the union seeks to exercise disciplinary power,—is made clear in *Granite State Joint Board*. Thus, "when a member lawfully resigns from the union, its power over him ends" (34 L. Ed. at 425); acceptance of union constitutional provisions or bylaw restrictions upon acquiring membership, no more than acquiescene in a strike vote, cannot subsequently form a basis for post-resignation discipline. The court below so held as should this Court in conformance with its concise holding in *Granite State Joint Board* that,

> ". . . [W]here, as here, there are no restraints on the resignation of members, we conclude that the vitality

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of Sec. 7 requires that the member be free to refrain in November (after resignation) from the actions (union rule) he endorsed in May (upon joining the union) and that his Sec. 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime". (34 L. Ed. 2d at 426).

C. The Fact That an Employee Accepted a Union Rule Against Employment in a Struck Establishment Upon Obtaining Union Membership Is Not a Valid Reason for Limiting His Section 7 Rights After Resignation and Such "Survival" of "Union Obligation" Is Not Necessary to the Union's Institutional Needs.

As the progress of this Court's decisions make clear, the union's right to discipline its members outside the ambit of Section 8(b)(1)(A) turns upon the contract between member and union (*N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. at 182). Where, as here, the "contract-constitution" contains no limitations on the right to resign, there is no warrant for reading into it an implied obligation to remain a member to the extent of being subject to union disciplinary control to enforce obligations allegedly assumed upon obtaining membership (*N. L. R. B.* v. *Granite State Joint Board*). Whether such an implied obligation is urged to derive from participation in a strike vote, as was the case in *Granite State Joint Board*, or from acceptance of a union constitutional provision against working for a struck employer as now urged here, the same policy considerations expressed in Section 7 reinforce ordinary contract principles against implying a contractual obligation to engage in specific union activities after the termination of membership. Thus, the court below properly concluded that "it is generally recognized that courts will not usually imply offenses" and that "extremely important national policy militates against the imposition of such an implied obligation" (Pet. App., p. 16a-17a).

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In balancing the interest of the union in preserving solidarity during a strike against the interest of the individual employee who no longer wishes to remain a member of or support the union, the court below properly concluded that Section 7 reflects a focal principle of national labor policy weighing the balance in favor of the individual. The court below, after emphasizing that Section 7 "expressly protects the right of any employee to refrain from any or all of the concerted activities guaranteed to employees under the Act" (Pet. App., p. 17a), concludes that the "voluntariness" characteristic of union membership carried with it the fact that the member was free to leave the association when its policies were no longer acceptable. Upon leaving, the member does not carry with him a perpetual obligation to obey a union's constitutional directives and is subject only to any "financial" obligations "due and owing" the association at the time membership terminates *Communications Workers* v. *N. L. R. B., supra.*

Although an employee may "accept" a union rule upon acquiring membership and becoming subject to the "contract-constitution", subsequent events may lead the employee to exercise his individual choice and disregard the rule. A reasonable accommodation of the competing interests involved, particularly where the rule precludes working during the course of a strike for any struck employer, allows the employee to change his mind without the risk of disciplinary action, provided the employee is willing to resign from the union before abandoning the rule. It would be incompatible with this reasoned accommodation to interpret the union's constitution and bylaws as imposing, by implications of "good faith" and "reasonableness", a surviving obligation of union fealty not to work during an authorized strike under any circumstances which may arise or change.

The power of unions to fine "members" together with the right to expel them from membership provide suf-

ficient bases upon which to compel obedience to union objectives. To further extend this power by creating a base for disciplinary action against members who accept the burdens of resignation by implying the "survival" of union obligations is neither necessary nor sensible to the "contract-constitution" rationale upon which the union's disciplinary powers are found to operate outside Section 8(b)(1)(A). To afford unions coercive disciplinary power to compel obedience not freely given by subjecting non-members to "continuing" obligations of union obedience after resignation is contrary to the institutional interests of unions as such and destructive of the purpose and policy of the Act. Thus,

> "Balancing the interests involved, it is likely that whereas genuine pro-strike morale among the bulk of the membership is a factor crucial to the union's ability to call a successful strike, the union has not argued and shown a serious need to substitute for that morale the power to coerce recalcitrants; absent clear need, the NLRB's bias against coercion and in favor of persuasion as the technique of union cohesion seems dispositive. Against the union's interest in an artificial solidarity must be weighed the member's Section 7 interest in freedom from restraint. . ."[9]

D. Creation of a Duty to Obey Union-Directed Objectives After Resignation on the Basis of Estoppel or Implied Obligations Is Neither Logical Nor Consistent with the Act.

The court below properly determined that employees who exercised their individual choice to resign membership effectively escaped the rule against working in a struck establishment following the date of resignation. No workable reason for upsetting this determination, which is fully consistent with this Court's decisions in *Allis-Chalmers,*

9. Comment, 80 Harv. L. Rev. 683, 687 (1967).

Scofield and *Granite State Joint Board,* is advanced by petitioner in No. 71-1417. On the contrary, and in direct disregard of the described principles of associational law applicable to free institutions, petitioner contends that although the individual may resign he is estopped to disregard the rule against working at a struck establishment on the basis of an obligation implied from "good faith" and "reasonableness" inherent in the "contract-constitution". This theory for avoiding the Court's decision in *Granite State Joint Board* is unsound as a matter of contract law and federal labor policy.

No member accepting membership and thereby the "contract-constitution" knowingly accepted a post-resignation effect of any constitutional provision or union rule. While a member's acceptance of a union rule may estop the member to disregard the rule while he remains a member and the union-member contract remains intact, such acceptance cannot reasonably be viewed as a commitment to remain a member or to be obedient to the rule after resignation. For example, while a member may agree to be subject to assessments during the period of his union membership, such an agreement neither commits him to remaining a member nor to remaining subject to assessments after resignation. Similarly, while a member may agree to a union rule against working in a struck establishment, it does not follow that he intends thereby also to commit himself to remain a union member for the duration of any strike or to remain subject to the rule after resignation of his union membership. To imply such post-resignation susceptibility to union disciplinary authority wreaks havoc with the "contract-constitution" principles upon which union immunity from 8(b)(1)(A) is premised and eviscerates the careful balancing of Section 7 rights in which this Court has engaged, as noted above.

To argue that a member's acceptance of union constitutional provisions or bylaws commits the individual to par-

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ticipate in union activities after resignation overlooks the fact that a union's right to compel participation in union activities, in derogation of the language in Section 7, is contingent upon the existence of the contract of membership. To permit a union to discipline a member on the basis of a union rule, after the individual's contract of membership as terminated, destroys the individual's Section 7 right to refrain from engaging in union activity by "escaping the rule through resignation". In sum, the court below properly concluded that under the circumstances present here, the NLRB arrived at a fair balance of legitimate union and member interests by deciding that, upon resignation, the union's disciplinary power over the member ends. Such a determination constitutes a proper and necessary exercise of the Board's "function of striking that balance to effectuate national policy (which) is often a difficult and delicate responsibility" (*N. L. R. B.* v. *Truck Drivers Union*, 353 U. S. 87, 96).

E. Effectuation of the Act's Policies Demands the Board Exercise Its Function to Balance Section 7 Rights by Determining the Reasonableness of Fines Under the Purposes of Section 8(b)(1)(A).

As the legislative history reflects and as this Court has observed, Sections 7 and 8(b)(1)(A) were enacted in the context of the concept that the union-member relationship subsisted upon and was measured by a "contract-constitution" (*N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. at 182). The principles of contract law applicable to free institutions and particularly voluntary associations have been predominant in this Court's accommodation of individual Section 7 rights with the institutional needs of unions to compel obedience to union rules. Thus, the right and effect of resignation and the necessity of "reasonable enforcement" form a common thread throughout the balanc-

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ing process which underlies *Scofield, Industrial Union of Marine and Shipbuilding Workers* and now *Granite State Joint Board.* Implicit in this decisional history and now presented for determination here are the facts that "good faith", "reasonableness" and "fair play" are factors inherent in any contractual relationship (1 Corbin, *Contracts*, 276-355; *Local 1912, I. A. M.* v. *United States Potash Co., supra.*) Where union conduct exceeds or is in derogation of that "good faith", "reasonableness" or "fair play" imbedded "in every contract of association" (*Polin* v. *Kaplan*, 257 N. Y. 277, 177 N. E. 833, 834 (1931)), the contract-constitution does not insulate it from the operation of 8(b)(1)(A) and cannot logically do so. Thus, where the exercise of disciplinary power, although ostensibly within the framework of internal union relationships, is not "reasonably related" to the union as an institution, the imposition of a fine is violative of 8(b)(1)(A), as the Court found in *N. L. R. B.* v. *Industrial Union of Marine and Shipbuilding Workers.* Similarly, where the disciplinary power takes the form of a fine which is not "reasonable" in amount, such transgression of the "fair play" and "good faith" standards of the "contract-constitution" is not and cannot be insulated from the reach of 8(b)(1)(A); on the contrary, once union disciplinary power in the form of excessive fines goes outside the area of "reasonableness" circumscribed by the contract-constitution, that contractual basis of exemption from 8(b)(1)(A) is no longer logically available and the Section, which bars coercion of members is applicable. This construction of Section 8(b)(1)(A) in the reasoned accommodation of union disciplinary power with individual Section 7 rights is evident in the Court's continued insistence that only "reasonable fines" and "reasonable enforcement" upon members are excluded from the operation of Section 8(b)(1)(A), and constitutes the bedrock upon which the court below properly concluded that the

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NLRB, in striking that delicate balance in national policy, must determine the reasonableness of fines.

As the court below and the Ninth Circuit in *Morton Salt Co.* v. *N. L. R. B.*, ... F. 2d ....., 82 LRRM 2066 (1972) correctly observed, where the existence of an unfair labor practice is in issue and particularly since the "reasonableness" of a fine draws the line between "contract-constitution" immunity and 8(b)(1)(A) operation, the Board can and must make that determination. Drawing upon an area of experience in the application of Section 8(b)(5), (e.g., *Longshoremen, I. L. A., Local 1419*, 186 NLRB No. 94), the Board can and must develop affirmative standards of "reasonableness" to provide the individual and the union with uniform guidance concerning the interplay of the contract-constitution and the Labor Act in the same way such standards were developed by the Board in jurisdictional dispute matters after this Court made clear that "the Board need not disclaim the power given it for lack of standards" (*N. L. R. B.* v. *Radio and Television Broadcast Engineers Union*, 364 U. S. 573, at 583 (1961)).[10] Nor would the development and application of such standards bring federal and state interests into conflict since the state courts, in strictly construing union disciplinary action against unions and to afford the individual every pos-

10. It is no bar to the adoption of the principles urged herein that the Board would be required to determine the "reasonableness" of unions' conduct,—an admittedly imprecise criterion. The expertise of the Board is regularly called upon to draw difficult lines and even to define what is "reasonable." In *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), this Court directed the Board to determine whether unions' use of private property should be required because of the absence of "reasonable" alternative means of communication. In *Quality Manufacturing Co.*, 195 NLRB No. 42, the Board itself adopted a rule under which the existence of employees' rights depended upon whether they had a "reasonable" basis to fear discipline. Indeed, in Section 8(b)(5) of the Act Congress created an unfair labor practice whose gravamen is a union's imposition of an "excessive" —hence "unreasonable"—fee.

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sible leeway to the exercise of free choice,[11] look to procedural and substantive elements not involved in the determination of the "reasonableness" of a fine. Further, and even in connection with the determination of whether a fine is excessive, the state courts assess the fine against the needs of the union and state labor law policy,[12] and do not deal with the delicate balance of Section 7 rights against the institutional needs of the union within the statutory matrix of Section 8(b)(1)(A) and the standards of the "contract-constitution" doctrine. Only the Board can make these latter accommodations and such balancing by an expert agency is fully consistent with the congressional and judicial scheme of administration of labor laws and policies.

Congress' purpose to name one central agency for the adjudication of the intricate issues of labor relations matters[13] is evidenced in this Court's insistence that these "delicate balances" be struck by the Board. Insistence upon the Board's "primary responsibility" to guide the development of national labor policy,[14] reflected in the preemption doctrine,[15] is equally applicable where, as here,

11. Christensen *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N. Y. U. L. Rev. 1 (1968).

12. E.g., *Jost* v. *Communications Workers of America*, 91 Cal. Rptr. 722; *Walsh* v. *Communications Workers of America*, 259 Md. 608, 27 A. 2d 148; *Communications Workers of America* v. *Maloney*, 486 P. 2d 1275 (Ore.); *Local 248, U. A. W.* v. *Natzke*, 36 Wis. 2d 237, 153 N. W. 2d 602; see also, *United Glass Workers* v. *Seitz*, 65 Wash. 2d 640, 399 P. 2d 74; *Retail Clerks Local 629* v. *Christianson*, 67 Wash. 2d 29, 406 P. 2d 327.

13. *Amalgamated Utility Workers* v. *Consolidated Edison*, 309 U. S. 261 (1940); *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (1938).

14. *N. L. R. B.* v. *Raytheon Company*, 398 U. S. 25, 28 (1970).

15. *International Longshoremen's Local 1416, AFL-CIO* v. *Ariadne Shipping Company*, 397 U. S. 195, 200 (1970); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959).

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the "power and duty of primary decision lies with the Board".[16] Once that duty is properly assumed within the framework of development of standards of "reasonableness" marking out the boundaries of Section 8(b)(1)(A)'s applicability to fines, "diversities and conflicts likely to result from a variety of local procedures and attitudes"[17] toward unions as institutions will be avoided. Development of such standards will, therefore, benefit the union as an institution as much as the member himself in the reasoned exercise of his Section 7 rights within the framework of the "contract-constitution". The court below so held.

F. The Extension of Unions' Disciplinary Power to Non-Members Is Contrary to Congress' Intent to Foster Free Collective Bargaining and to Principles of Sound Policy.

To grant unions the right to discipline non-members would violate the Federal scheme whereby the result of economic warfare between the parties should depend upon the will of the parties to continue the conflict. The logic of a strike involves a test of the combatants' resolve to withstand the harm to which such economic warfare necessarily and intentionally subjects the parties; the employer's loss of present and anticipated income is contrasted with employees' loss of salary and fear of replacement. It is at least arguable that *Allis-Chalmers* has already effected an unwarranted dislocation of this play of economic forces in compelling union members, through fear of fine as well as expulsion, to continue a strike beyond their desire and ability to withstand its consequences. To permit unions to exercise the same control over those who renounced their membership in order to avoid the continuing harm imposed

16. *Garner* v. *Teamsters Union*, 347 U. S. 485, 489-491 (1953).

17. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243 (1959).

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by this statutorily recognized form of warfare constitutes clear intervention on one side of the dispute.

The bargaining equality in which Congress sought to leave the parties to a labor dispute has been recognized by this Court which has held that ". . . the results of the contest [are left] to the bargaining strengths of the parties". *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). And in *Granite State Joint Board* itself, the Court recognized that it is entirely appropriate that the effects of the parties' knowingly undertaken economic struggle should affect the results of that struggle. Thus, Justice Douglas acknowledged, in speaking for the Court, that

> "Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the spectre of hardship to his family; the case with which the employer replaces the strikers may make the strike seem less provident."

And the Act's legislative history supports the view that artificial hindrances to the unfettered play of relative economic strengths inhibits free collective bargaining. According to Senator Taft:

> "Our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels he can make an unreasonable demand and get away with it." (I Leg. Hist. 1007).

The effect of granting to unions the right to fine nonmembers would be to promote situations in which unions can make and secure such demands, since it practically prevents the affected employees from ceasing their strike activity, no matter the economic consequences which their strike produced. Such a result would not merely permit unions the exercise of such disciplinary power as to render their strikes effective, but would grant the power virtually to guarantee their success.

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That result, apart from its inherent inequity, frustrates the purpose of the Act in that it interferes with the free play of economic forces. It inhibits collective bargaining by placing a restraint on the ability of adverse economic consequences to produce a settlement.[18]

> "Collective bargaining works because the parties know that if they didn't move towards an agreement they will get hurt. A strike to be effective must hurt both sides. It is the strike and fear of a strike that causes compromise and agreements . . ."[19]

According to this Court's decision in *H. K. Porter*, collective bargaining is a system of economic tension based on the parties' respective strength. Artificial supports to one side or the other,—as by governmental subsidies to management, welfare payments to strikers, or the fines involved here, produce results which are unrelated to the parties' strength, their will or resolve, and are thus inconsistent with the legislative design.

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18. In the *Granite State* case the play of economic forces led a number of employees to return to work, a factor whose impact on the ultimate terms on which the parties would resolve their dispute was both natural and consistent with the idea that the effect of the strike's harm—on one party or the other—should affect their bargaining posture. The communicated threat of fines which surely inhibited other employees in that case from resigning union membership and returning to work created an artificial bargaining posture inconsistent with free collective bargaining.

19. Affidavit of Dr. Herbert Northrup, Director of the Industrial Research Unit of the Wharton School of Finance and Commerce, p. 41 (presented to the court in *Francis, et al.*, v. *Davidson, etc., et al.* (unreported, D. Md., 1972), and referred to in the Jurisdictional Statement in this Court in *U. S. Chamber of Commerce* v. *Francis, et al.* (No. 71-1554).

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CONCLUSION.

For the reasons stated above, together with those additional arguments and authorities raised by the Board in No. 71-1417 and by the Boeing Company in No. 71-1607, it is urged that the Court affirm the decision below.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 71–1417

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL–CIO, Petitioner, *v.* National Labor Relations Board et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 21, 1973]

PER CURIAM.

In this companion case to *National Labor Relations Board* v. *The Boeing Company, ante,* — U. S. —, we must decide whether our decision in *National Labor Relations Board* v. *Granite State Joint Board,* 409 U. S. 213, authorizes the Board to find that a union commits an unfair labor practice in seeking court enforcement of fines imposed for strikebreaking activities by employees who have resigned from the union, even though the union constitution expressly prohibits members from strikebreaking. We hold that it does.

On September 16, 1965, the day after the expiration of the collective bargaining agreement between Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union), and the Boeing Company (the Company), the Union called a lawful strike and picketed the Company's Michoud, Louisiana, plant to further its demands for a new contract. The strike continued for 18 days, during which time 143 of the 1,900 production and maintenance em-

ployees represented by the Union crossed the picket line to work. All of these employees had been members of the Union before the strike,[1] but 61 resigned their membership prior to returning to work and another 58 resigned after they returned to work.[2] These resignations were tendered in registered or certified letters to the Union. Neither its constitution nor its by-laws contained any provision expressly permitting or forbidding such resignations.

The strike ended on October 4, 1965, after ratification of a new collective bargaining agreement by the Union membership. During late October and early November, the Union notified all employees who had crossed the picket line to work during the strike that charges had been preferred against them under the Union constitution for "Improper Conduct of a Member" because of their having "accept[ed] employment . . . in an establishment where a strike or lockout exist[ed]." They were advised of the dates of their union trials, which were to be held even in their absence, and of their right to be represented by any counsel who was a member of the International Union. Fines were imposed on all employees who had worked during the strike without regard to whether or not such employees had resigned or had remained members.[3] None of the disciplined employees

[1] The expired collective agreement contained a maintenance-of-membership provision that required new employees, as a condition of continued employment, to become members of the Union unless they notified both the Union and the Company within 40 days of accepting employment that they did not wish to join. Further, Union members were required to maintain their membership during the life of the contract.

[2] The remaining employees who returned to work during the strike did not resign from the Union.

[3] A standard fine of $450 was imposed on each of the disciplined employees. The amount was reduced, however, for those few members who appeared at their hearings, apologized for their actions and pledged loyalty to the Union.

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processed intra-union appeals. To the extent that fines were not paid,[4] the Union sent written notices to the offending employees stating that the matter had been referred to an attorney for collection. Suits were initiated in state court against nine employees for the purpose of collecting the fines plus attorneys' fees and interest. None of these suits has been resolved.

The Company filed an unfair labor practice charge with the National Labor Relations Board alleging that the Union had violated § 8 (b)(1)(A) of the National Labor Relations Act, 29 U. S. C. § 158 (b)(1)(A).[5] The General Counsel issued a complaint, and the Board held that the Union violated § 8 (b)(1)(A), *supra*, by fining those employees who had resigned from the Union before returning to work during the strike, and by fining those who had resigned after returning to work to the extent that such fines were based on post-resignation work. No violation was found in the Union's fining members for crossing the picket line to work during the strike or in its fining those employees who resigned after they returned to work for work performed prior to resignation. The Board ordered the Union to cease and desist from fining employees who had resigned from the Union for their post-resignation work during the strike and from seeking court enforcement of such fines. It further ordered reimbursement to employees who had already paid fines for any amount imposed because of post-resignation

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[4] None of the $450 fines has been paid, but reduced fines have been paid in a few instances.

[5] Section 8 (b)(1)(A) of the Act provides, in relevant part:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . : *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ."

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work. The Court of Appeals sustained these holdings, —U. S. App. D. C. —, 459 F. 2d 1143 (1972), and on the Union's petition for review, we granted certiorari. 409 U. S. 1074.

In *National Labor Relations Board* v. *Granite State Joint Board, supra,* 409 U. S., at 217, we held that "[w]here a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct." Since that case there was no provision in the union's constitution or bylaws limiting the circumstances in which a member could resign, we concluded that the members were free to resign at will and that § 7 of the Act, 29 U. S. C. § 157,[6] protected their right to return to work during a strike which had been commenced while they were union members.[7] The union's imposition of court-collectible fines against the former members for such work was therefore held to violate § 8 (b)(1)(A), *supra.*

Here, as in *Granite State,* the Union's constitution and by-laws are silent on the subject of voluntary resignation from the Union.[8] And here as there we leave open the

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[6] Section 7 of the Act provides, in relevant part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

[7] It was stipulated in that case that all 31 of the employees who resigned from the union during the strike and returned to work participated in the strike vote, and voted in favor of the strike. *National Labor Relations Board* v. *Granite State Joint Board,* 409 U. S. 213, 219, n. 2 (dissenting opinion of MR. JUSTICE BLACKMUN).

[8] Since the collective bargaining agreement expired prior to the times of the resignations, the maintenance-of-membership clause therein was no impediment to resigning.

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question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. Since there is no evidence that the employees here either knew of or had consented to any limitation on their right to resign, we need "only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated." *Granite State, supra,* at 216.

The Union contends, however, that a result different from *Granite State* is warranted in this case because, even though its constitution does not expressly restrict the right to resign during a strike, it does impose on members an obligation to refrain from strikebreaking. The Union asserts that this provision has been consistently interpreted to bind a member, not withstanding his resignation, to abstain from strikebreaking for the duration of an existing strike. It urges that this provision may be enforced as a matter of contract law against one whose membership has ceased, because it was an obligation he undertook while a member.

The provision in the Union's constitution which proscribes strikebreaking by its terms purports only to define "misconduct of a member." Nothing in the record indicates that Union members were informed, prior to the bringing of the charges that were the basis of this action, that the provision was interpreted as imposing any obligation on a resignee.[9] Thus, in order to sustain

[9] The Union points out in its brief that at the 1972 International Union convention its interpretation of the strikebreaking proscription was made explicit. This constitutional amendment made seven years after the strike here is persuasive evidence that it was not there before, or at a minimum, that the proscription then existing did not apprise the employees of their asserted obligations to the Union.

the Union's position, we would first have to find, contrary to the determination of the Board and of the Court of Appeals, that the Union constitution by implication extended its sanctions to nonmembers, and then further conclude that such sanctions were consistent with the Act. But we are no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in *Granite State*.[10] Accordingly, the judgment of the Court of Appeals sustaining the Board's finding of an unfair labor practice on the part of petitioner Union is

Affirmed.

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[10] In its reply brief, the Union argues that in *Granite State* there was no limiting rule on post-resignation return to work during the course of the strike, but that in this case, the Union constitution proscribed such conduct. In *Granite State*, however, there was a duly enacted rule prohibiting any member from aiding and abetting the employer during the strike and subjecting violators to a $2,000 fine. On its face, the constitutional proscription here advanced is no broader than that rule.

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SUPREME COURT OF THE UNITED STATES

No. 71–1417

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL–CIO, Petitioner, *v.* National Labor Relations Board et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 21, 1973]

MR. JUSTICE BLACKMUN, concurring in the judgment.

In *NLRB* v. *Textile Workers*, 409 U. S. 213 (1972), the strikebreaking employees, while they were members of the union, had all voted to strike. On the day following the inception of the strike, these employees also voted in favor of a union resolution that anyone aiding or abetting the company during the strike would be subject to a fine.* And all had participated in the strike prior to resigning from the union.

I was in solitary dissent in *Textile Workers*, 409 U. S., at 218. I emphasized there that "it seems likely that the three factors of a member's strike vote, his ratification of strikebreaking penalties, and his actual participation in the strike, would be far more reliable indicia of his obligation to the union and its members than the presence of boilerplate provisions in a union's constitution," *id.*, at 220; that the Court's opinion seemed to me "to exalt the formality of resignation over the substance of the various interests and national labor policies that [were] at stake," *id.*, at 221; that § 7 of the National

*See 409 U. S., at 218–219 nn. 1 and 2.

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Labor Relations Act "does not necessarily give him [the employee] the right to abandon these [union] activities in midcourse once he has undertaken them voluntarily," *id.*, at 222, quoting from 446 F. 2d 369, 373; and that the policy of § 7 would not be frustrated by a holding that an employee, in the circumstances of that case, could "knowingly waive his § 7 right to resign from the union and to return to work without sanction." *Id.*, at 222–223.

The present case, however, is a very different situation. None of the Boeing employees who resigned from the Union had been given notice of a strikebreaking penalty before the strike vote or before their participation in the strike. The imposition of a penalty was never ratified formally by the union membership. The members were not notified that post-resignation strikebreaking was proscribed and would subject them to union discipline. And the provision in the Union's constitution, referred to by the Court, *ante*, p. 5, as to a member's general obligation to refrain from strikebreaking, surely does not make up for this lack of notice, and it would not do so even if it were clearly applicable, which it is not, to strikebreaking after resignation from the Union.

Without effective notice of obligations that are supposed to be assumed, there can be no waiver of a member's § 7 right to refrain from participation in a legal strike. In the absence of such notice, § 8 (b)(1)(A) bars the union from subjecting a member to a choice between the substantial obligation of weathering the strike and that of being subjected to court-collectible fines for failure to do so.

I, therefore, join in the Court's judgment.